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No. 85-

IN THE
Supreme Court of the United States

October Term, 1985

GEORGE VERNON HANSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the submission of a deliberately incomplete financial disclosure report required by the Ethics in Government Act of 1978 ("EIGA") is punishable under 18 U.S.C. §1001 even though the 1978 Congress eliminated a misdemeanor provision and instead prescribed enforcement only by a civil remedy.

2. Whether the essential element of materiality in a false statement prosecution under 18 U.S.C. §1001 is a pure question of law that the judge may withdraw from the jury's consideration.

3. Whether a jury may hear testimony from a "legal expert" on the proper interpretation of a statute to rebut an advice-of-counsel defense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-20a, *infra*) is reported at 772 F.2d 940. The pretrial opinion of the district court denying motions to dismiss the indictment (Pet. App. D, pp. 23a-47a, *infra*) is reported at 566 F. Supp. 162. Opinions of the district court denying defendant's motion to have the element of materiality submitted to the jury and defendant's post-trial motions (Pet. App. E and F, pp. 48a-67a, *infra*) are not reported.

JURISDICTION

The opinion of the court of appeals was entered on August 30, 1985, and a timely petition for rehearing and suggestion for rehearing *en banc* were denied on November 1, 1985 (Pet. App. B and C, pp. 21a-22a *infra*). The jurisdiction of this Court rests upon 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

The Ethics in Government Act ("EIGA"), Pub. L. No. 95-521, 92 Stat. 1824, provides, in pertinent part (2 U.S.C. 706):

> FAILURE TO FILE OR FALSIFYING REPORTS
>
> Sec. 106. The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report pursuant to section 102. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000. . . .

The false statements statute, 18 U.S.C. §1001, provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

This is the first case in which an elected official subject to the public disclosure provisions of EIGA has been charged either criminally or civilly for having omitted allegedly reportable items from his annual EIGA financial disclosure forms. Petitioner was a member of the United States House of Representatives from Idaho's Second Congressional District between 1965 and 1969 and from 1975 until the election that followed his conviction in this case. He was convicted after a trial by jury on all four counts of an indictment charging him with violating the false statements statute (18 U.S.C. §1001) by omitting information from financial disclosure forms required by EIGA in the years 1979, 1980, 1981 and 1982. He was sentenced to serve five to fifteen months' imprisonment and to pay a fine of $40,000. We recount briefly the facts surrounding the enactment of EIGA, petitioner's efforts to comply with EIGA, and his felony trial and conviction.

1. *Congress enacts the Ethics In Government Act.*

On May 3, 1977, President Carter sent to the Congress a proposed "Ethics in Government Act of 1977." It related only to Executive Branch employees and it required, *inter alia*, annual financial disclosure reports. Section 104(a)(1) of the President's proposed bill provided as follows (H.R. Rep. No. 95-642, Part I, 95th Cong., 1st Sess. (1977) p. 66):

> FAILURE TO FILE OR
> FALSIFYING REPORTS
>
> SEC. 104 (a)(1) Any individual who knowingly falsifies or fails to report any information required under section 102 shall be fined in an amount not exceeding $5,000 or imprisoned for not more than one year, or both.

a. The Senate passes a bill including a misdemeanor penalty.

In May 1977, the Senate Committee on Governmental Affairs reported out S. 555, a "Public Officials Integrity Act of 1977." Part II.C. of S. 555 prescribed public disclosure of the financial interests of high-level federal officers and employees in all three branches. Section 307 of S. 555 was titled "Failure to File, Falsifying Reports, Procedure," and subsection (a)(1) of Section 307 provided as follows (S. Rep. No. 95-170, 95th Cong., 1st Sess. (1977), p. 197):

> Any individual who knowingly and willfully falsifies or omits to report any material information such individual is required to report under section 302 shall be fined in an amount not exceeding $5,000 or imprisoned for not more than one year, or both.

The Senate debated S. 555 on June 27, 1977, and passed it with some amendments. There was no discussion on the Senate floor of the bill's enforcement provisions. 124 Cong. Rec. 20956-21019.

b. Three committees of the House of Representatives propose alternative bills, one of which provides for no criminal penalties.

The subject of financial disclosure was considered separately by the House Committee on the Judiciary, the House Committee on Post Office and Civil Service and Armed Services, and the House Select Committee on Ethics. Each reported out a different version of the proposed legislation. The Judiciary Committee bill (H.R. 1) included a misdemeanor penalty provision in Section 6(a)(1). H.R. Rep. No. 800, 95th Cong., 1st Sess. (1977), p. 4. The Ethics Committee bill (H.R. 7401) also contained a criminal penalty provision with a maximum of one year's imprisonment and a $10,000 fine. H.R. Rep.

No. 95-574, 95th Cong., 1st Sess., pp. 50-51 (1977). The Post Office Committee proposal (H.R. 6954) did not authorize any criminal sanction. Its proposed legislation included only a civil remedy with a maximum $5,000 penalty and authorization to take "any appropriate personnel or other action." H.R. Rep. No. 95-642, Title 1, 95th Cong., 1st Sess., p. 13 (1977). No provision of the Post Office Committee's proposal explicitly repealed 18 U.S.C. §1001 or otherwise declared it inapplicable to the new proposed reporting requirement.

c. The bill approved by the House omits criminal penalties.

When the three proposals came up for House discussion, the initial speaker was Congressman Danielson of California, who advised that pursuant to a procedural rule previously adopted (124 Cong. Rec. 30407), the bill before the House (H.R. 13850) contained "compromise provisions resolving the differences between the several bills." 124 Cong. Rec. 30414. Congressman Danielson then explained (*id.*; emphasis added):

> One of the fundamental differences of H.R. 13850 is that the disclosure provisions in title I relating to the legislative branch, title II relating to the executive branch, and title III relating to the judicial branch now provide that *provisions of the bill do not provide for a criminal penalty but do provide for a civil penalty for failure to comply with the disclosure provisions*. Each of these titles provides that the Attorney General may bring a civil action against an individual who knowingly and willfully falsifies or who knowingly and willfully fails to report information required to be reported under the provisions of the bill.

Shortly thereafter, Congressman Moorhead of California, who opposed several provisions of the bill, noted that "the substitute contains a number of major improvements — most notably, the deletion of unnecessary criminal penalties with respect to [the] financial disclosure section." 124 Cong. Rec. 30415 (1978).

One of the Members of Congress who had been involved in the discussions leading to the compromise was Congresswoman Schroeder of Colorado. She enumerated one "of the good provisions of the substitute" as being "no specific criminal sanction for misfiling," 124 Cong. Rec. 30419, and her "summary of the intentions" of the financial disclosure provisions discussed the sanctions for "failure to file or falsifying reports" entirely in terms of civil liability. She also added to the description in the report the following observation concerning these sanctions (124 Cong. Rec. 30422):

> Proper respect for human error must guide us all here.

Two speakers later, Congressman Gilman of New York noted his support for H.R. 13850, which he described as a bill that requires financial disclosure "and *provides for civil penalties* for failure to adhere to [its] requirements." 124 Cong. Rec. 30423 (emphasis added).

Congressman Preyer, chairman of the House Select Committee on Ethics stated that (124 Cong. Rec. 30425):

> Title I establishes a maximum civil penalty of a $5,000 fine for knowing and willful falsification or knowing and willing failure to report the required information.

His detailed written analysis of the bill also stated that it provided "civil penalties in the case of an individual who knowingly and willfully falsifies or fails to report any of the required information." 124 Cong. Rec. 30427.

The next speaker was Congressman Wiggins of California, who had dissented from the Ethics Committee's approval of such legislation (H.R. Rep. No. 95-574, 95th Cong., 1st Sess. (1977), pp. 59-64), and who began his remarks by asking the Members of the House, "Why do we do this to ourselves?" 124 Cong. Rec. 30429. Among the reasons he cited for opposing H.R. 13850 was *his* belief that criminal sanctions had not been eliminated. He said (*id.*):

> Some Members have been concerned about their criminal liability. Well, they should be concerned about their criminal liability. I hope they have not been led to believe that by eliminating the criminal sanctions in this bill they have been relieved of vulnerability, because they have not.
>
> Title 18 contains a section 1001 which makes it a felony subject to 5 years' imprisonment to willfully and knowingly file a false document or false statement. That is general law. It continues in effect, and that will apply with respect to the statements filed here. Therefore, even though there are no explicit criminal penalties in this bill, the Members will all be subject to criminal penalties if the Attorney General elects to proceed under 18 U.S.C. 1001.

Shortly after Congressman Wiggins' remarks, another opponent of the legislation, Congressman Frenzel of Minnesota, expressed his view (124 Cong. Rec. 30430; emphasis added):

> Now that the criminal penalties have been removed from this legislation, against my wishes, I might add, *there is only a civil penalty to deter a potential nondiscloser.*

Congressman Frenzel repeated this view again shortly thereafter (124 Cong. Rec. 30438; emphasis added):

> *Since this bill has no criminal penalties*, the practical effect is that candidates are not going to report unless they have a good chance of winning.

A later speaker explicitly stated his understanding of why the criminal sanction was omitted. Congressman Bauman of Maryland said (124 Cong. Rec. 30457; emphasis added):

> Under the full disclosure provision which this bill makes, substantial civil penalty is provided. *It would have been a criminal penalty, but it was changed to get the bill through the House.*

This point was re-emphasized by Congressman Moorhead at a later point in the debate, when he said of an amendment that ultimately became Section 501 of EIGA: "[T]hese conflict of interest provisions are the one remaining portion of the ethics bill, where criminal penalties are involved." 124 Cong. Rec. 30471.

Debate on H.R. 13850 continued on September 27, 1978. Early in the debate, Congressman Danielson said (124 Cong. Rec. 31977; emphasis added):

> Title II of the bill is concerned with the disclosure of personal finances *and provides for a civil penalty for failure to file or falsifying a disclosure report.*

At the conclusion of the debate, H.R. 13850 was passed by the House. 124 Cong. Rec. 32019 (1978). In conference, the Senate accepted the House version and removed from the Act the misdemeanor penalty provision that had been in S. 555. 124 Cong. Rec. 36467.

2. *Petitioner seeks legal advice on his EIGA obligations and submits his forms.*

EIGA became law on October 26, 1978. The first reports required by the Act were due on May 15, 1979, for

the preceding calendar year. Shortly before that time, petitioner asked his long-time Idaho attorney, John Runft, what effect, if any, EIGA had on his obligation to report Mrs. Hansen's assets and liabilities. Because of a property settlement agreement that Congressman and Mrs. Hansen had previously executed, Mr. Runft had earlier advised the Hansens, who in turn notified the House in an exchange of correspondence, that the pre-EIGA financial disclosure requirement — House Rule XLIV — did not require the Congressman to report Mrs. Hansen's assets. After researching EIGA over the weekend of May 5-6, 1979, Mr. Runft advised petitioner that the enactment of EIGA did not alter the nonreportability of Mrs. Hansen's assets or liabilities. The Congressman thereupon omitted a loan and a commodities profit that Mrs. Hansen had secured in her own name from his financial disclosure forms.[1]

In 1980, petitioner had written a book attacking the Internal Revenue Service and describing the inequities of tax enforcement and in 1981 he prepared to introduce legislation designed for taxpayer protection and tax simplification. Sometime before the summer of 1981, the Congressman planned a direct-mail campaign to enlist financial and citizen support for these ventures, and in this regard he later formed a group known as the "Association of Concerned Taxpayers" ("A.C.T."). To fund these ventures, he personally borrowed in 1981 a total of $135,000 by way of three interest-bearing loans from two acquaintances in Virginia. It was undisputed that by the

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1. Although petitioner did not dispute the existence of the loan or the commodities transaction and there was not a scintilla of evidence that either transaction was unlawful or improper, the prosecutor's proof dwelt on the transactions themselves (which involved a controversial financier, Nelson Bunker Hunt) rather than on the issue of the petitioner's *mens rea* in omitting the transactions from his EIGA forms. The proof of consultations with counsel was undisputed, and there were contemporaneous office notes corroborating Mr. Runft's testimony.

end of March 1982, petitioner had personally advanced to A.C.T. and/or its suppliers the same amount — a total of $135,000 — for its direct-mail campaign (Def. Exs. 51-68). Sometime before May 15, 1982, the Congressman asked James McKenna, an attorney who was a member of his staff and whom he had also consulted on other EIGA questions, whether the $135,000 in loans — nominally made out to him, but intended for A.C.T. — was reportable on his EIGA form for 1981. Mr. McKenna advised that the loans were not reportable. On the basis of this advice, petitioner did not list these loans on his EIGA form.

3. *Petitioner is charged and convicted of submitting false statements.*

On April 7, 1983, the Congressman was indicted on four counts of violating the false statements statute by omitting information from his EIGA filings. The omission of Mrs. Hansen's loan and commodities profit formed the basis for the first three counts of the indictment, and the omission of the $135,000 in loans supported the fourth count. Petitioner moved to dismiss the indictment because, *inter alia*, Congress had not authorized the filing of criminal charges for willful omissions from EIGA forms. A full brief, detailing EIGA's legislative history, was submitted in support of this motion. On June 13, 1983, the district court denied the motion to dismiss because 18 U.S.C. §1001 had not been explicitly repealed by EIGA, and repeals by implication are disfavored.

After an interlocutory appeal on a motion to dismiss resting on the Speech and Debate clause, the case was set for trial on March 19, 1984. Prior to trial, the prosecution moved *in limine* for a ruling that the element of materiality was a question of law and should not be submitted to the jury. The defense argued that under recent decisions of this Court and other Circuits this element must be left for the jury's determination. The district

court granted the prosecution's motion on the authority of *dictum* in a 1956 District of Columbia precedent and the jury was instructed as a matter of law that the omissions from Congressman Hansen's EIGA forms were material for purposes of 18 U.S.C. §1001.

At trial, the prosecution contended that petitioner had knowingly and willfully omitted the items in question from his EIGA reports to conceal them.[2] The defense argued that the Congressman omitted the items based on the advice of his attorneys — Messrs. Runft and McKenna — and with the knowledge and acquiescence of the appropriate committee of the House of Representatives. On the last day of the trial, the prosecution called, over defense objection, the Chief Counsel of the Executive Branch's Office of Government Ethics to testify as a legal expert on the proper interpretation of the EIGA. He testified that the statutory interpretations relied upon by Messrs. Runft and McKenna to advise Hansen were incorrect, and that those interpretations "would defeat" the policy of EIGA. The jury returned a guilty verdict on all counts.[3]

4. *The Court of Appeals affirms.*

The court of appeals affirmed the conviction. On the principal issue of statutory construction, the court of appeals agreed with the district court that a rigorous ap-

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2. Evidence at trial revealed that the full amount of Mrs. Hansen's commodities profit was properly reported on the Hansens' joint tax return.

3. The case proceeded to trial just as the news media in Washington were filled with reports of allegations that Attorney General-designate Edwin Meese may have violated EIGA. The district judge denied motions for a continuance and change of venue and proceeded, over vigorous defense objection, to sequester the jury. Petitioner's request for mandamus to overrule the sequestration order was denied. Notwithstanding substantial briefing of the issue whether jury sequestration could be compelled over defense objection, the court of appeals refused even to discuss the isue in its opinion.

plication of the doctrine disfavoring repeals by implication was called for (Pet. App. A, p. 5a, *infra*) (citations omitted)):

> [W]e have no choice but to make appellant's task more difficult on another preliminary point: It is a venerable rule, frequently reaffirmed by the Supreme Court, that 'repeals by implication are not favored,' and will not be found unless an intent to repeal is 'clear and manifest.' It will not do to give this principle of statutory interpretation mere lip service and vacillating practical application. A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating.

On that foundation, the court below dispatched the argument that there was no criminal sanction. The court of appeals also affirmed, without any independent analysis, the district court's decisions to take the issue of materiality from the jury and to permit "expert" legal testimony on the proper interpretation of EIGA.

REASONS FOR GRANTING THE WRIT

Former Congressman Hansen has been sentenced to jail for having omitted information from a statutory reporting obligation that did not exist before Congress enacted EIGA in 1978. No criminal sanction was prescribed by EIGA. Congress provided instead only a civil penalty for deliberate and willful omissions. The prosecutor has overruled Congress' choice in this regard by invoking the general false statements statute. The important primary question in this case is whether a violation of EIGA carries a criminal penalty notwithstanding the overwhelming expressions of contrary intent by the 1978 Congress. Whether Congressmen, Cabinet officers or, indeed, members of this Court or lower federal courts may be subjected to *criminal* investigations by prosecutors and grand juries for alleged omissions in EIGA reports is a legal issue that affects government at all levels. The fate of many more individuals than the petitioner depends on the answer to this legal question, and this Court should resolve it authoritatively. This case also raises significant questions concerning the proper role of the jury in false-statement cases. On each of these questions, the decision below conflicts with many well-reasoned and established authorities.

Since all Members of Congress and most other officers subject to EIGA file their disclosure forms in Washington, D.C., the venue for criminal prosecutions of deliberate omissions will usually be the United States District Court for the District of Columbia. Consequently, this is not a situation in which this Court can await the possibility of a conflict among the Circuits before resolving the important statutory question of whether EIGA is enforceable with criminal penalties. The decision below will govern most future situations in which the legal issue may arise. In addition, it is important that the public, as well as government officials,

know authoritatively whether 18 U.S.C. §1001 is applicable to the filing of these financial disclosure forms. So long as the question has been resolved only by an intermediate federal appellate court, it will remain — particularly in view of the expressed position of many Congressmen[4] — a debatable subject.

1. *The erroneous rejection of congressional intent.*

We argued to the court below that the language and legislative history of EIGA demonstrated overwhelmingly that Congress did not wish to have it enforced with criminal penalties and that if it had been contemplated that criminal penalties would attach to such omissions, the law would never have passed. The language and legislative history proved the following:

> (1) that the pertinent text of EIGA established a civil penalty as the complete sanction for any knowing and willful falsification, failure to file or failure to report, and did not include any supplemental remedy language of the type included elsewhere in the Act. *Compare* Section 106 ("Such remedy shall be in addition to any other remedy available under statutory or common law"),
>
> (2) that Congress deliberately eliminated a provision, initially passed by the Senate, that would have prescribed only a misdemeanor criminal penalty for any willful omission from an EIGA report, and
>
> (3) that a number of Congressmen made statements on the floor of the House expressing their belief that, in its final form, the Act contained no criminal sanction for deliberate nondisclosure.

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4. In the court below, 123 Congressmen submitted an *amicus curiae* brief expressing their view that Congress never contemplated that criminal penalties would attach to EIGA violations.

In response to our arguments, the Government acknowledged the following:

> (1) "that there was no consensus among either supporters or opponents of the legislation as to whether criminal sanctions would apply to EIGA disclosure reports" (Gov't Brief at 31),
>
> (2) that "there is no expression of the intent of Congress as a whole — including the Senate — regarding the application of criminal penalties to EIGA reports" (Gov't Brief at 33), and
>
> (3) that "some members of the House may not have believed that criminal penalties would apply, while other members anticipated the application of Title 18's prohibitions" (Gov't Brief at 42).

This proof established that the 1978 Congress had not "in language that is clear and definite," *Williams v. United States*, 458 U.S. 279, 290 (1982), attached criminal penalties to EIGA violations. In such circumstances, this Court has recently refused to permit criminal prosecution. *See Dowling v. United States*, 105 S.Ct. 3127, 3131-3132 (1985). The court below turned this time-honored principle of lenity applicable to criminal statutes on its head, however, and required the defense actually to prove Congress' intent *not* to make criminal penalties applicable to EIGA violations. The court held (Pet. App. A, p. 5a):

> It was not necessary for the Congress that enacted the EIGA to authorize criminal punishment, for that authorization had been conferred by an earlier Congress, and remained on the statute books. The precise issue is whether the Congress that enacted the EIGA *precluded* the criminal sanctions that would otherwise attach.

This Court has repeatedly recognized that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," *United States v. Bass*, 404 U.S. 336, 348 (1971), it is up to the legislature to define criminal activity. *Id.* It follows that if Congress imposes a novel statutory obligation it must choose, *when the new law is enacted*, whether to prescribe enforcement with criminal or civil penalties. The issue turns on the intent of the enacting Congress.

The principle of statutory construction that repeals by implication are not favored is not a rule that can override a contemporaneous expression of legislative intent. "Resort is had to canons of construction as an aid in ascertaining the intent of the legislature," *Hassett v. Welch*, 303 U.S. 303, 313-314 (1938), "not [as] a license to disregard . . . . congressional intent." *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975)); *accord*, *United States v. Universal Corp.*, 344 U.S 218, 221 (1952); *United States v. Alpers*, 338 U.S. 680, 682 (1950). Where, as here, all parties agree that the legislative record demonstrates an absence of consensus on the intent to enforce EIGA through pre-existing criminal penalties, the inquiry is over. *See United States v. Universal Corp.*, 344 U.S. at 224 (Government's construction of statute rejected because it could not "be said to be decisively clear . . . one way or the other").[5]

Contrary to the views of the court below, this court has limited the application of a generally applicable criminal statute when a later Congress indicates implicitly that the law is inapplicable to certain otherwise regulated conduct. In *Dowling v. United States*, 105 S.Ct. 3127

5. *See generally*, 1A Sutherland, *Statutory Construction*, §23.09, p. 332 (Sands 4th ed. 1985) ("As the legislative intent defines the operation of the statute and divulges the purpose of limitations of the enactment, it may establish or deny a repeal by implication. Therefore in the process of construing a statute the intent of the legislature is always of prime importance").

(1985), a case that the court below did not even discuss, the question was whether a general criminal law, the National Stolen Property Act, enacted many years ago, applied to the transportation of sound recordings manufactured without the consent of the copyright owners. In evaluating that question, this Court did not "straightjacket", 105 S.Ct. at 3139, its analysis by invoking the doctrine barring repeals by implication. Instead, the majority looked beyond the literal language of the National Stolen Property Act (which would have governed the defendant's acts) to the Copyright Act and to various copyright amendments that post-dated the revisions to the Stolen Property Act. Indicia of congressional intent such as those brushed aside by the court below were held dispositive.

Upon reviewing all these sources of congressional intent, the *Dowling* Court found that "Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement," 105 S.Ct. at 3136, and it noted that Congress "acted with exceeding caution" before imposing even misdemeanor criminal penalties in this area. *Id.* The Court further acknowledged that Congress had repeatedly "declined . . . to provide felony penalties for copyright infringement involving sound recordings and motion pictures." 105 S.Ct. at 3137. On these bases, the Court found that Congress did not intend the felony prohibitions of the Stolen Property Act to be applicable.

By the same token, it is clear from the legislative history of EIGA that Congress "chiefly relied on" civil remedies to enforce that Act and that the Congress acted "with exceeding caution" with respect to criminal penalties. This case is even more compelling than *Dowling* because neither House of Congress ever remotely considered that felony penalties might apply to deliberate omissions from EIGA forms. The milder misdemeanor sanction was considered and rejected — thereby plainly foreclosing the more draconian application of 18 U.S.C.

§1001, a felony provision. The contrary result reached by the court below "presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly," (105 S.Ct. at 3138) — a "presumption" that this Court repudiated in *Dowling*.

Rather than applying the law as Congress intended it in 1978, the court below has applied the law as it believes the law should be. It has pointed to no new statutory obligations enacted in or about 1978 where Congress left the application of 18 U.S.C. §1001 to implication, whereas we affirmatively established the contrary by showing that when the 1978 Congress wanted Section 1001 to apply, it said so explicitly. For example, on September 30, 1978, shortly *before* enacting EIGA, Congress amended the Federal Environmental Pesticide Control Act to authorize disclosure of filed pesticide information following appropriate application by an individual who represents that he will not be offering or making such information otherwise available. That law also provided (92 Stat. 829; 7 U.S.C. §136h(g)(3)):

> Section 1001 of Title 18 shall apply to any affirmation made under paragraph (1) of this subsection.

Similarly, shortly *after* enacting EIGA, the 95th Congress passed the Natural Gas Policy Act, Pub.L.No. 95-621, 92 Stat. 3397, which established a new regulatory scheme to govern the distribution and sale of natural gas. Section 503(d)(2) of that law, 15 U.S.C. §3413(d)(2), provided as follows:

> *Application of Title 18.* — Any untrue statement or omission of material fact to a Federal or State agency upon which the Commission relied shall be deemed to be statement or entry under section 1001 of title 18.

Finally, another federal statute enacted about the same time in 1978 — the Outer Continental Shelf Lands Act Amendments, Pub.L.No. 95-372, 92 Stat. 629 —contained the following specific language in Section 302(d)(3)(B), 43 U.S.C. §1812(d)(3)(B):

> Any person who falsifies records or documents required to be maintained under any regulation promulgated under this subsection shall be subject to prosecution for a violation of section 1001 of Title 18, United States Code.

These three laws enacted at about the same time as EIGA demonstrate that when the 1978 Congress was creating a new statutory obligation which required the submission of affirmations, reports or records, it provided explicitly that 18 U.S.C. §1001 should apply whenever it wished to have that criminal sanction available. The inescapable inference is that the omission of such language in EIGA — particularly when fortified by the elimination of the misdemeanor provision — meant that *only* civil sanctions were to be utilized.[6]

2. *The violation of the right to trial by jury.*

Both courts below agreed that the materiality of each charged false statement was an essential element of an

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6. The curious logic of the court of appeals is manifested by its surmise that the omission of a specific reference to 18 U.S.C. 1001 "was rather attributable to the belief that some Members of Congress, *and perhaps even a number providing the crucial margin for passage of the bill,* would have objected to the inclusion," (Pet. App. A, pp. 10a-11a, (emphasis added)). That, of course, is exactly the point. If the bill could not have passed with an express reference to Section 1001's applicability, it cannot be said that the Congress that enacted EIGA intended criminal penalties. Rather than approving a criminal sanction only if Congress intended the penalties of Section 1001 to apply, the court below required proof that "Congress as a whole [intended] that §1001 [would] not [be] independently applicable." *Id.*

offense under 18 U.S.C. §1001. Both courts held, however, that this element was to be determined by the court, and not by the jury.

This Court has made it clear that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary *to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.*" *Jackson v. Virginia*, 443 U.S. 307, 315-316 (1979); *accord, In re Winship*, 397 U.S. 358, 364 (1970). Because of this "elementary proposition," *Moore v. United States*, 429 U.S. 20, 22 (1976), it is simply impermissible for a trial judge to direct any findings of fact against the accused in a criminal case "regardless of how overwhelmingly the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977).

The Court below held that materiality is a pure question of law to be resolved by the court. But as the Fifth Circuit, *en banc*, recently found: "There is no categorical distinction between 'legal' and 'factual' questions, for in every case application of a legal principle turns on the presence of particular facts." *United States v. Johnson*, 718 F.2d 1317, 1321 (5th Cir. 1983) (*en banc*) (citations omitted). Especially when, as here, the statement charged under Section 1001 is alleged to be false by *omission*, necessary and critical factual issues lie at the very heart of the materiality determination. In this type of setting, this Court has noted:

> The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. In considering whether summary judgment on the issue is appropriate, we must bear in mind that the underlying objective facts, which will often be free from dispute, are

> merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and *these assessments are peculiarly ones for the trier of fact.*

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976) (emphasis added); *accord, United States v. Johnson*, 718 F.2d at 1324 n.20 (distinguishing between false disclosure and failure-to-disclose cases).

At least two Circuits have held within the past few years that the issue of materiality in a prosecution under Section 1001 is for the jury. *See United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981); *United States v. Weiss*, 431 F.2d 1402, 1406 & n.3 (10th Cir. 1970); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979); *United States v. Talkington*, 589 F.2d 415, 416-417 (9th Cir. 1978). *Cf. United States v. Adler*, 623 F.2d 1287, 1292 n.8 (8th Cir. 1980); *United States v. Voorhees*, 593 F.2d 346, 349 (8th Cir. 1979).

To be sure, a majority of the Circuits have agreed with the court below on this point, (Pet. App. A, p. 18a (citing *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir. 1984)), but the existence of conflicting rules in the Circuits requires this Court definitively to resolve the issue. The scope of a defendant's constitutional right to a jury trial on all elements of a criminal charge should not depend upon the federal district in which he is prosecuted.

3. *The presentation of a "legal expert."*

In its rebuttal case, the prosecution was permitted to call an expert witness to testify on how EIGA should be read and interpreted. Although the Federal Rules of Evidence have liberalized the use of expert testimony in the

federal courts,[7] one area has remained out-of-bounds for experts — questions of domestic law.[8] *See, e.g.*, 31 Am. Jur. 2d, *Expert and Opinion Evidence*, §69 (1967); 32 C.J.S. *Evidence* §453 (1964); 3 Louisell & Mueller, *Federal Evidence* §382 at 645; *McCormick, Handbook of the Law of Evidence*, §12 (2d ed. 1972); 7 *Wigmore on Evidence* §1952 (Chadbourn ed. 1978). Expert legal testimony is excluded because it is not needed to aid the tribunal's determination of the matter before it. "[T]he judge (or the jury as instructed by the judge) can determine [the law] equally well." 7 *Wigmore* at 1952. "[T]he special legal knowledge of the judge" makes the witness' testimony superfluous. *Id.*

The Sixth Circuit recently unanimously reversed a criminal conviction because the prosecution had presented expert legal testimony on bankruptcy law to help secure a conviction. *See United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984). The *Zipkin* court said (729 F.2d at 387 (citations omitted)):

> It is the function of the trial judge to determine the law of the case. It is impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles.

Other federal courts of appeals have virtually uniformly agreed with the ban on such evidence for similar, and additional, reasons. *See United States v. Gleason*, 726 F.2d 385, 388 (8th Cir. 1984); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 96-97 (2d Cir.

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7. Rule 702 gives the trial court authority to permit expert testimony if such testimony "will assist the trier of fact to understand the evidence or to determine a *fact* in issue." Fed. R. Evid. 702 (emphasis added). And Rule 704 permits an expert to testify as to his opinion concerning an "ultimate issue to be decided by the trier of *fact*." Fed. R. Evid. 704 (emphasis added).

8. Foreign law raises questions of fact which may be presented by expert testimony. *See United States v. McClain*, 593 F.2d 658, 666-67 (5th Cir. 1979).

1983)); *United States v. Bronston*, 658 F.2d 920, 930 (2d Cir. 1981); *United States v. Bernhardt*, 642 F.2d 251, 253 (8th Cir. 1981); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-511 (2d Cir. 1977); *Cooley v. United States*, 501 F.2d 1249, 1253-54 (9th Cir. 1974); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1313, 1332 (E.D. Pa. 1980).[9]

In this case, the testimony of the legal expert was devastating to petitioner's advice-of-counsel defense. His testimony misdirected the jury's attention to the non-germane question of whether the legal advice that petitioner received was correct, *see Williamson v. United States*, 207 U.S. 425, 453 (1908), and "[i]n effect . . . amounted to a statement that under the applicable law the defendant was guilty. Such testimony from a [legal expert] obviously would have impact upon a jury." *United States v. Zipkin*, 729 F.2d at 387.

CONCLUSION

This case presents to this Court for the first time an important question of statutory construction relating to the enforcement of new disclosure obligations imposed on public employees. Even a nominee of a major party for vice-president has been implicated in conduct that presents the prospect of criminal enforcement if the law is read as the court below would read it. Since there is substantial evidence that the Congress that enacted EIGA never intended to authorize criminal prosecution — which is preceded, of course, by criminal investigation

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9. Only the Fifth Circuit appears to have permitted the use of expert legal testimony, but it did so because of the "wide latitude" accorded to defendants trying to establish a lack of criminal intent. *See United States v. Garber*, 607 F.2d 92, 99 (5th Cir. 1979) (*en banc*). But even that Circuit subsequently limited *Garber* "to its bizarre facts." *United States v. Daly*, 750 F.2d 1076, 1083 (5th Cir. 1985).

by prosecutors and grand juries — this Court should review the court of appeals' decision authorizing such intrusions into legislative and judicial arenas. Serious concerns of separation of powers and "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should," *United States v. Bass*, 404 U.S. at 348, strongly counsel against the result reached below.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 9, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5377

UNITED STATES OF AMERICA
v.
GEORGE VERNON HANSEN,
Appellant

Appeal from the United States District Court
for the District of Columbia
(Criminal No. 83-00075)

Argued December 18, 1984
Decided August 30, 1985

Nathan Lewin, with whom *Stephen L. Braga* and *Frank A.S. Campbell* were on the brief, for appellant.

Reid H. Weingarten, Attorney, Department of Justice, with whom *James M. Cole*, Attorney, Department of Justice, was on the brief, for appellee.

United States Senator *Orrin G. Hatch* was on the brief for himself and other members of the United States Congress as *amici curiae*, urging reversal.

Ailan A. Ryan, Jr. was on the brief for the Institute for Government and Politics, Free Congress Foundation and Lawrence A. Withers, *amici curiae*, urging reversal.

Before: GINSBURG and SCALIA, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court by SCALIA, *Circuit Judge*.

SCALIA, *Circuit Judge:* Appellant, former Representative George V. Hansen, appeals from his conviction for making false statements in matters within the jurisdiction of a department or agency of the United States in violation of 18 U.S.C. §1001 (1982), based on omissions in financial disclosure statements he filed under the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of Titles 2, 5, 18, 26, and 28 U.S.C. (1982)) ("EIGA"). The primary issues on appeal are whether violations of the EIGA are subject to the criminal penalties of 18 U.S.C. §1001, whether the omissions from Hansen's forms were material, and whether Hansen's trial started within the time limits established by the Speedy Trial Act, 18 U.S.C. §§3161-74 (1982).

I

Title I of the EIGA, 2 U.S.C. §§701-09, requires Members of Congress to file annual financial disclosure reports detailing, with certain exceptions, their income, gifts, assets, financial obligations, and business transactions. Hansen was indicted on four counts for failing to disclose, respectively, a $50,000 bank loan to his wife, cosigned by Nelson Bunker Hunt, on his form for 1978, an $87,475 silver commodities profit on his form for 1979, a $61,503.42 loan from Nelson Bunker Hunt on his form for 1980, and $135,000 in loans from private individuals on his form for 1981. He was not indicted, however, under any provision of the EIGA, but rather under 18 U.S.C. §1001, which forbids the willful filing of false statements in any matter within the jurisdiction of a department or agency of the United States.

Before trial, Hansen moved to dismiss the indictment on grounds that §1001 was not applicable to EIGA violations, that he was singled out for prosecution in violation of the fifth amendment to the Constitution, and that the filing of financial disclosure reports under the EIGA constituted "legislative activity" protected by the

Speech and Debate Clause of the Constitution, U.S. Const. art. I, §6, cl. 1. The District Court denied the motion. *United States v. Hansen*, 566 F. Supp. 162 (D.D.C. 1983). This court affirmed the order of the District Court with respect to the Speech and Debate Clause issue and found that the other two issues did not involve an appealable "final decision" under 28 U.S.C. §1291. *United States v. Hansen*, No. 83-1689 (D.C. Cir. Aug. 1, 1983) (unpublished Order), *cert. denied*, 104 S. Ct. 709 (1984).

At trial, Hansen relied principally on an advice-of-counsel defense, contending that two of his attorneys had advised him that the transactions in question were not reportable. The jury rejected this defense and found the accused guilty on all four counts. Hansen appeals under 28 U.S.C. §1291. He and *amici*[1] urge reversal on numerous grounds, only three of which warrant discussion beyond that contained in the District Court's opinions and rulings.

II

The most significant issue presented is whether 18 U.S.C. §1001 has any application to EIGA violations. The language of the statute reads, in relevant part, as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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1. One hundred twenty-three members of Congress filed an *amicus* brief arguing that Congress did not intend criminal sanctions to attach to EIGA violations. The other *amicus* brief, also on appellant's behalf, was filed by the Institute for Government and Politics, Free Congress Foundation and Lawrence Arlen Withers.

Section 1001 is a statute of general applicability, designed to protect a "myriad [of] governmental activities." *United States v. Rodgers*, 104 S. Ct. 1942, 1946 (1984). Its "sweeping . . . language," *id.*, clearly embraces the omissions on Hansen's EIGA forms. The House Committee with which the forms were filed is a "department" for purposes of §1001, since that term "was meant to describe the executive, legislative and judicial branches of the Government." *United States v. Bramblett*, 348 U.S. 503, 509 (1955). *See United States v. Diggs*, 613 F.2d 988, 999 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980) (false statements submitted to House of Representatives Office of Finance covered by §1001). The subject of the forms is also a "matter within the jurisdiction" of that department, since the Supreme Court has held that phrase "should not be given a narrow or technical meaning," *Bryson v. United States*, 396 U.S. 64, 70 (1969), but applies whenever there is " 'statutory basis for an agency's request for information,' " *United States v. Rodgers*, 104 S. Ct. at 1947 (quoting *Bryson*, 396 U.S. at 71). The "request" here is made by the statute itself, which requires the forms to be filed with the Clerk of the House for transmission to the Committee, 2 U.S.C. §§703, 705. The fact that the Committee can take no dispositive action with regard to matters disclosed on the forms, but can only investigate and make recommendations to the full House, *see* House Rule X, cl. 4(e)(1)(B), is inconsequential, since the term "jurisdiction" embraces the authority to conduct an official inquiry, *see United States v. Rodgers*, 104 S. Ct. at 1947 & n.2.

In light of the plain applicability of §1001, Hansen misperceives the issue before us when he urges, to quote the caption of the first section of argument in his principal brief, that "Congress prescribed only a civil remedy and did not authorize criminal punishment for the submission of a false EIGA statement." Brief for Appellant at 27. It was not necessary for the Congress that enacted

the EIGA to authorize criminal punishment, for that authorization had been conferred by an earlier Congress, and remained on the statute books. The precise issue is whether the Congress that enacted the EIGA *precluded* the criminal sanctions that would otherwise attach.

In approaching that issue, we give appellant the benefit of the doubt on a preliminary epistemological point: We will assume (without deciding) that an erroneous congressional belief, expressed in the statute or evident in its legislative history, that §1001 did not by its terms apply, would be fully equivalent to an explicit decision to preclude its application, so that the result would be an inadvertent *pro tanto* repeal of §1001 rather than the enactment of an obligation inadvertently subject to criminal penalties. On the other hand, we have no choice but to make appellant's task more difficult on another preliminary point: It is venerable rule, frequently reaffirmed by the Supreme Court, that " 'repeals by implication are not favored,' " *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978) (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974), quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)); *see generally* 1A SUTHERLAND STATUTORY CONSTRUCTION §23.10 (C. Sands 4th ed. 1972 & 1985 Supp.), and will not be found unless an intent to repeal is " 'clear and manifest.' " *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (quoting *Red Rock v. Henry*, 106 U.S. 596, 602 (1883)). It will not do to give this principle of statutory interpretation mere lip service and vacillating practical application. A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of

whether its implications will be held to suspend the effects of an earlier law that they favor or oppose.

Hansen argues that the presumption against implied repeal is inapplicable to this case, since no repeal is involved. He reasons that since there was no obligation for Members of Congress to make financial disclosures before adoption of the EIGA in 1978, there was no pre-existing criminal liability to repeal. We cannot accept this resourceful characterization of the issue, which would render statutes such as §1001 the most feeble of enactments, virtually requiring for their application to new obligations (as appellant's brief at times urges) an affirmative intent, in the legislation creating the new obligations, that they should apply. The fallacy in appellant's analysis is that it takes the presumption against implied repeal to be a rule based exclusively upon assumed substantive inertia rather than—what in our view it is—a rule based primarily upon assumed legislative practice. The major rationale of the presumption, in modern times at least, is not that Congress is unlikely to change the law—so that in the present case, where there was no preexisting criminal liability for this particular filing, the presumption would be inapplicable; but rather, that Congress "legislate[s] with knowledge of former related statutes," *Continental Insurance Co. v. Simpson,* 8 F.2d 439, 442 (4th Cir. 1925), and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction. The application of that rationale to the present case is clear: The terms of §1001 cover falsification of EIGA financial disclosure forms; if Congress wished to exclude that coverage it would normally have said so; we will not readily conclude that it did so by implication.

With these principles in mind, then, we proceed to consider whether the EIGA repeals the application of

§1001 to its disclosure provisions. It does not do so expressly—even though it does take pain to exclude application of "any *State or local law* with respect to financial disclosure by reason of holding the office of Member or candidacy for Federal office." 2 U.S.C. §708 (emphasis added). (We note in passing that, if repeal was in fact intended, this absence of express exclusion is even more strange than it would normally be since, as we shall discuss in more detail below, the threatened application of §1001 was explicitly brought to the attention of a House committee that reported one version of the bill both by the Department of Justice and by the Clerk of the House, and to the attention of the full House, in floor debate, by two of its Members.) We look then, for some indication of implicit repeal strong enough to overcome the contrary presumption. Hansen points to 2 U.S.C. §706, which provides:

> The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report pursuant to section 702 of this title. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000.

He argues that this provision "appears, on its face, to contain the complete sanction that Congress has prescribed for any knowing and willful falsification." Brief for Appellant at 29. It does indeed represent the complete sanction that the 1978 Congress provided, but the question remains whether it clearly suggests a repeal of the sanction provided by earlier legislators. We think not. There is no difficulty in applying both 18 U.S.C. §1001 and 2 U.S.C. §706. Indeed, the two sections combine to produce a natural progression in penalties: those who intentionally fail to file EIGA forms are subject only to

the civil sanction of §706, while those who lie on their forms are additionally subject to the criminal penalty of §1001. If this does not represent evident harmony, it at least does not begin to approach the "irreconcilable conflict" that the Supreme Court has instructed us to require as textual evidence of an implicit repeal. *Red Rock v. Henry*, 106 U.S. at 601. *See, e.g., Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982). Surely the attachment of this civil sanction is less suggestive of an intent to displace §1001 than the attachment of a criminal sanction would be. Yet even in this *a fortiori* situation, the courts have uniformly rejected displacement claims. For example, in *United States v. Burnett*, 505 F.2d 815 (9th Cir. 1974), *cert. denied sub nom. Lyon v. United States*, 420 U.S. 966 (1975), defendants argued that they should have been charged under a specific misdemeanor statute forbidding false statements to obtain unemployment benefits rather than under the felony provisions of §1001. The Ninth Circuit disagreed:

> To assume . . . that the mere passage of a specific statue covering an area of conduct also regulated by a more general statute limits enforcement of the general statute by carving out an exception to it . . . is, in effect, to accomplish partial repeal of the general statute. Repeals by implication are not favored; effect should be given to overlapping statutes if possible. . . . In the present case the Government had the option of proceeding under either statute.

505 F.2d at 816 (citation omitted). *See also, e.g., United States v. Fern*, 696 F.2d 1269, 1274 (11th Cir. 1983) (false statements made to an IRS auditor could be prosecuted under either §1001 or a specific provision in the Internal Revenue Code); *United States v. Gordon*, 548 F.2d 743, 745 (8th Cir. 1977) (false statements to obtain medicare payments could be prosecuted under either §1001 or a more specific criminal statute); *United States v. Radetsky*, 535 F.2d 556, 567-68 (10th Cir.), *cert.*

denied, 429 U.S. 820 (1976) (same); *United States v. Carter*, 526 F.2d 1276, 1278 (5th Cir. 1976) (false statements in connection with Small Business Administration loan applications could be prosecuted under either §1001 or a specific criminal provision governing the loan applications).

Hansen also discerns implied repeal in a difference between 2 U.S.C. §§706 and 704. The latter section, entitled "Accessibility of reports," deals generally with the manner in which the public obtains access to EIGA disclosure forms. Subsection 704(e) prohibits use of the forms for certain purposes (including commercial purposes, the determination of credit ratings and the solicitation of money) and authorizes a civil action by the Attorney General, similar to that in §706, for violation of that prohibition. Unlike §706, however, it contains the following stipulation: "Such remedy shall be in addition to any other remedy available under statutory or common law." Hansen argues that the absence of a similar provision in §706 shows that Congress meant *that* civil remedy to be exclusive. We think not. The two statutory sections are simply not so parallel that equivalent language in this respect would be expected. Of course 18 U.S.C. §1001 would in any event have no application to violations of §704, so it is surely not the continuing effect of that criminal provision that was being explicitly preserved. But more importantly, §704, unlike §706, addresses an area where—without the specific disclaimer—it might be thought that private civil actions were precluded, notably, state actions for defamation of credit or invasion of privacy. The language of the disclaimer seems specifically directed to civil actions, since criminal sanctions are rarely described as "remedies." In sum, we agree with the District Court that the reason for spelling out the absence of preclusion or repeal in §704 was the possibility that otherwise its provision of a civil remedy might be held to preclude private civil actions; and that "[a]s there is no parallel private right with respect to the

requirement in section 702 to file correct reports, there is no proper analogy between section 706 (which enforces section 702) and section 704." 566 F.Supp. at 165.

Appellant and *amici* point out that many statutes imposing new reporting requirements explicitly provide that the criminal penalties of §1001 will be applicable. *See, e.g.*, the Federal Pesticide Act of 1978, 7 U.S.C. §136h(g)(3) (1982). They infer from this a constant congressional belief that §1001 does not apply to new reporting statutes in the absence of express provision, so that that absence here is determinative. The argument is flawed as a technical matter, because it deprives §1001 of its plainly intended self-operative effect, reducing it, insofar as subsequently enacted reporting obligations are concerned, to no more than a shorthand code to which Congress can conveniently refer when it wishes to enact criminal penalties. And it is flawed as a plausible estimation of congressional belief, since it posits that Congress has both consistently misunderstood one of the basic rules of legislation—under which §1001 would apply to new reporting statutes absent express provision to the contrary, *see supra* pages 5-7—and consistently ignored numerous decisions holding §1001 applicable to reporting statutes silent on the point, *see, e.g., United States v. Burnett, supra*. A much more likely explanation is that Congress included the references to §1001 as a means of reminding those subject to the new laws of the self-operative, previously enacted sanctions, or as a means of clarifying for its own Members who voted upon the new laws the consequences of their action. Even if one thinks the references were included for their operative effect, they necessarily establish no more than that Congress chose in some cases to make assurance doubly sure, but did not do so here. One might surmise—though it would be only a surmise—that the failure to include such redundancy in the EIGA was not mere happenstance, but was rather attributable to the belief that some

Members of Congress, and perhaps even a number providing the crucial margin for passage of the bill, would have objected to the inclusion. But even if true this falls far short of establishing a belief on the part of Congress as a whole that §1001 was not independently applicable.

There is one other arguable textual indication of repeal, not raised by appellant or *amici*, but worthy of attention: 2 U.S.C. §705(b), which provides for advisory opinions interpreting the EIGA to be issued by the designated committees of the House and Senate, prescribes that any individual "who, after the issuance of the advisory opinion, acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of such act, be subject to any sanction provided *in this chapter*." (Emphasis added.) Since it can hardly be thought that Congress meant the advisory opinion to be a protection against the civil sanctions of the EIGA but not against the criminal penalties of 18 U.S.C. §1001, the italicized limitation arguably indicates a belief that §1001 is not applicable. The point would have great force if, by reason of the limitation of the provision to sanctions "in this chapter," an advisory opinion would in fact not immunize against §1001 criminal prosecution. But that is obviously not so. Good faith reliance upon advice of counsel would establish a defense against §1001, *see United States v. Smith*, 523 F.2d 771, 778 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); reliance upon a specifically authorized pronouncement of one of the designated committees would *a fortiori* do so. The limitation of the immunization to sanctions "in this chapter" thus creates no legislative absurdity, and is at most weak evidence of a belief that §1001 does not apply. It may have been included simply because that is the routine formulation (so routine that it did not attract the attention of appellant and *amici* here); or because it was thought necessary to establish this defense against the new civil sanctions, but superfluous to do so against the

criminal penalty of §1001, with its well-established requirements of *mens rea*, *see, e.g.*, *United States v. Mekjian*, 505 F.2d 1320, 1324 (5th Cir. 1975).

Finally, Hansen relies upon certain portions of the legislative history of the EIGA. We will not review them at length, since they are set forth and discussed fully in the opinion of the District Court. As the District Court found, while there is categorical indication in the legislative history that some Members of Congress believed §1001 would apply by its terms to an EIGA violation, there is no *unequivocal* indication that *any* Member of Congress thought the contrary. Farily read, however, several statements suggest the latter belief. But even if they are fully credited, they do not establish that as the belief of Congress by the "clear and manifest" evidence the Supreme Court has instructed us to require. Reading the legislative history in the light most favorable to Hansen, it reveals that both the Clerk of the House and the Department of Justice—the latter speaking to one proposed version of the EIGA that did not contain its own criminal penalty, and three proposed versions that did (which, as observed earlier, would even more strongly suggest preclusion of §1001)—expressed to the relevant House committee the view that §1001 would apply;[2] that the criminal sanction provisions included in earlier House and Senate versions of the EIGA were dropped from the final bill, with the explanation by one of the bill's proponents in the House that it was done "to get the bill through the House," 124 CONG. REC. 30,457 (1978) (remarks of Rep. Bauman); and that in the House debate

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2. The Department of Justice's advice, contained in a letter from Assistant Attorney General Wald to the Chairman of the House Select Committee on Ethics, addressed application of §1001 only to Executive Branch employees, though the Clerk's advice, recited in that letter, specifically addressed its application to Members of Congress. *See* J.A. 448-50. In any case, insofar as the issue of implied preclusion of §1001 is concerned, there is little if any ground for distinction between the two applications.

several Members expressed views indicating a belief that §1001 would not apply to EIGA violations, *see, e.g., id.* at 30,414 (remarks of Rep. Danielson), 30,415 (remarks of Rep. Moorhead), while two Members (one an opponent and one a supporter of the bill) stated explicitly their belief that it would, *see id.* at 30,429 (remarks of Rep. Wiggins), 30,444 (remarks of Rep. Thompson). We simply cannot see in this a "clear and manifest" indication of congressional belief that §1001 was excluded. To the contrary, the pattern is entirely consistent with the sort of legislative gamesmanship we described earlier, in which some Members of Congress were gambling on the expectation that §1001 would be precluded, and others (who favored criminal penalties) were gambling on the opposite. The weakness of indication of legislative intent is highlighted when one realizes that all the expressions of views described in the foregoing legislative history pertain only to the House. We have no indication beyond the text of the statute what members of the Senate thought on this issue. For all we know, they may have receded from the criminal penalties adopted in the Senate version of the bill, *see* S. 555, 95th Cong., 1st Sess. (1977), *reprinted in* 123 CONG. REC. 21,017 (1977), only because they thought it certain or likely that §1001 applied anyway. Precisely that explanation is suggested by the curious failure of the Joint Explanatory Statement of the Committee of Conference to mention the elimination of criminal penalties, *see* H.R. REP. NO. 1756, 95th Cong. 2d Sess. 65-69 (1978), and by the curious description of the conference outcome reported to the House floor by one of the conferees: "As in the House version, *specific reference* to criminal penalties was removed from this legislation." 124 CONG. REC. 36,467 (1978) (remarks of Rep. Moorhead) (emphasis added).

The District Court reached "[t]he inescapable conclusion . . . that Congress simply did not intend to render section 1001 inapplicable to the intentional falsification of EIGA financial disclosure reports." 566 F.Supp. at

168-69. *Accord, United States v. Claiborne*, No. CR-R-83-57-WEH (D. Nev. unpublished transcript of Mar. 13, 1984 proceedings). We need not go that far. It suffices that there is not remotely—neither in the textual indications we have considered, nor in the various episodes of legislative hsitory, nor in all of them combined—a *clear and manifest* indication of an intent to repeal.

Hansen appeals to the so-called rule of lenity: " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). It is, quite frankly, difficult to assess the scope of this accepted principle. One can recite, as appellee has, the Supreme Court's advice that it "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan v. United States*, 364 U.S. 587, 596 (1961) (footnote omitted). But in truth that provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity. In the present case, however, we think the answer is plain. When faced with questions of interpretation relating to §1001, pertaining to matters at least as "ambiguous" as the alleged repealer here, and not even involving the presumption against implied repeal, the Supreme Court has found the rule of lenity inapplicable. *See United States v. Yermian*, 104 S. Ct. 2936, 2940 n.7 (1984); *United States v. Rodgers*, 104 S. Ct. at 1948-49. Moreover, to the extent the rule is based upon solicitude for the individual defendant who violates the law before its meaning is clarified, rather than upon some more general notion that in case of doubt Congress should not be deemed to have unsheathed the sword of criminal penalty, it has no valid application here. Hansen has not only not been surprised by a novel or unexpected interpretation of the law, *cf. United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985), but was in fact warned of

its application with a specificity that a prospective lawbreaker rarely enjoys. The forms that Hansen signed all contained a warning, immediately above or below the signature line, that "[a]ny individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil and criminal sanctions. See 2 U.S.C. §706 and 18 U.S.C. §1001."

III

Hansen contends that even if §1001 applies to his EIGA filings, he has not violated that statute because the omissions from his forms were not "material." The portion of §1001 under which Hansen was charged, *see supra* page 2, does not explicitly require a showing of materiality, but we have held that requirement to be implicit, *see Freidus v. United States*, 223 F.2d 598, 601 (D.C. Cir. 1955). As we have described the requirement:

> The test of materiality is whether the statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination." Proof of actual reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects.

United States v. Diggs, 613 F.2d at 999 (quoting *Weinstock v. United States*, 231 F.2d 699, 701-02 (D.C. Cir. 1956)) (footnote omitted). Hansen argues that his omissions could not have been material because no federal agency or department "was conducting any inquiry or investigation, or making any determination whatever, that would have been affected in the slightest if Congressman Hansen had, in 1979, 1980, 1981 and 1982 put on his EIGA forms the debts and transactions which the indictment alleges he should have reported." Brief for Appellant at 53. This argument misunderstands the nature of the materiality requirement: A lie influencing the possibility that an investigation might commence

stands in no better posture under §1001 than a lie distorting an investigation already in progress. *See United States v. McIntosh*, 655 F.2d 80, 83 (5th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (false statement material because "disclosure of the truth could have provoked the agency to action"). And it is beyond doubt that information contained on (or omitted from) EIGA forms could in some cases influence the possibility of an authorized investigation by a federal department. As noted earlier, House committees are federal departments for the purposes of §1001. As required by 2 U.S.C. §703(d)(1), the reports filed by Hansen with the Clerk of the House were forwarded by him to the "designated committee" of the House, the Committee on Standards of Official Conduct. That is the committee charged by the House with the duty, among others, "to investigate . . . any alleged violation, by a Member, officer, or employee of the House, of the Code of Official Conduct or of any law, rule, regulation, or other standard of conduct . . . and after notice and hearing, to recommend to the House, by resolution or otherwise, such action as the committee may deem appropriate . . . ." House Rule X, cl. 4(e)(1)(B). House Rules restrict in some respects the receipt by Members of money in the form of gifts or income (Rules XLIII, cl. 3; XLIII, cl. 4; XLVII) and require Members to behave in a fashion which "shall reflect creditably on the House of Representatives" (Rule XLIII, cl. 1). The Standards Committee's rules require its staff to "present to it any evidence available to the staff reasonably indicating that any Member . . . may have committed a violation" of these House Rules, and provide that the Committee shall conduct an investigation if it determines that that evidence merits further inquiry. Committee Rule XIII. Thus, the statute and the House and Committee Rules combine to authorize examination of EIGA forms and consequent investigation to detect violations of House ethical standards.

Further addressing the "materiality" point, Hansen asserts that there was no indication that his omissions had, in the words of *Diggs*, *supra*, a "natural tendency to influence" any investigation, whether ongoing or potential. There is no doubt that specific disclosure of the actual transactions in question would have had such a tendency: after they came to light, the Committee undertook an investigation and concluded that the transactions violated House Rules. *See In the Matter of Representative George V. Hansen*, H.R. REP. NO. 891, Vol. 1, 98th Cong., 2d Sess. 2, 325-26, 388, 425 (1984). Hansen's point, however, is that because of the nature of the EIGA forms the required disclosure would have been too general to have influenced any investigation or action. With respect to one of the omitted transactions, a bank loan to his wife cosigned by Nelson Bunker Hunt, he notes that the only effect of including the omitted material would have been to add one more line to his form for 1978: "First National Bank of Dallas III" ("III" indicates indebtedness from $15,000 to $50,000). This, he argues, would not remotely have disclosed that aspect of the transaction which presumably violated House Rules (the fact that Hunt was guarantor of the loan) and thus would have had no "natural tendency" to provoke Committee investigation or action. Assuming that this correctly describes the reporting requirement (which is by no means clear),[3] Hansen has selected, of course, the example best suited to his case; the other required disclosures would have been much more informative. We are of the view, however, that even a falsification of this sort comes within §1001. The materiality requirement that we have found implicit in that provision excludes a

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3. *See* 2 U.S.C. §702(d)(1)(B), requiring, in some cases, the reporting of gifts to spouses and the identification of donors. A gift is defined as a "rendering . . . of . . . any thing of value," 2 U.S.C. §707(3). Free use of the credit of Nelson Bunker Hunt, which his cosignature of the loan conferred, was assuredly something of value.

matter unrelated to the subject of the agency's or department's responsibility—for example, misrepresenting the occupation of a corporate director where that is irrelevant to the determination at hand, *see, e.g., United States v. Talkington*, 589 F.2d 415, 417 (9th Cir. 1978). But where, as here, the falsification pertains specifically to the area the department is charged to investigate (a filing Member's financial transactions), and tends to conceal in any degree—even beyond the point where further concealment might be thought superfluous—material that would prompt or affect an investigation, we will look no further. Application of §1001 does not require judges to function as amateur sleuths, inquiring whether information specifically requested and unquestionably relevant to the department's or agency's charge would really be enough to alert a reasonably clever investigator that wrongdoing was afoot. Here the falsifications related to financial transactions within the Committee's charge, and tended to conceal information that would have prompted investigation or action; no more is needed.

Hansen further argues that the District Court improperly withheld this materiality question from the jury. We have previously held, however, that materiality under §1001 is a matter of law to be determined by the court. *See Weinstock v. United States*, 231 F.2d at 703. A majority of the circuits has reached the same conclusion. *See, e.g., United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), *cert. denied*, 105 S. Ct. 112 (1984); *but see, e.g., United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

IV

Hansen alleges that his trial did not commence within the time limits of the Speedy Trial Act, 18 U.S.C. §§3161-74 (1982). The seventy-day time period specified in the Act was due to expire on February 24, 1984. On January 26, Hansen agreed to a trial date of March

19, 1984, thereby waiving his right to have the trial start sooner. The trial did not commence until March 20.

Virtually all of the time from January 26 to March 19, however, was excludable for purposes of the Speedy Trial Act's seventy-day time calculation. The Act provides in 18 U.S.C. §3161(h)(1)(F) that periods of delay "resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" may be excluded from the seventy-day period. During almost the entire period from January 26 to March 19, numerous pretrial motions filed by the government and Hansen were under consideration by the court. Likewise during this period, the Clerk of the House of Representatives filed a motion to quash a subpoena in the case, which the court considered for several weeks. Hansen asserts that delays arising from such motions had already been envisioned in the court's fixing, and the defendant's acceptance, of the March 19 date, so that that date had to be regarded as subject to no further extensions permitted by the Speedy Trial Act. Althought the trial judge's order setting the trial date of March 19 did state that the extension would "allow the filing or revival of anticipated motions which might well require substantial responses by the parties," *United States v. Hansen*, Crim. No. 83-00075, slip op. at 2 (D.D.C. Jan. 27, 1984), it seems to us most unlikely that the experienced trial judge here meant to imply that the extension was final and absolute. That would have displayed a foolhardy confidence in her ability precisely to calculate the time needed to dispose of yet-unforeseen pretrial matters—such as the defendant's last-minute motion for change of venue because of prejudicial publicity, which induced the trial court to require a sequestered jury, arrangements for which caused delay of the trial from March 19 to March 20. Assuming, however, that that was what the extension to March 19 meant, the consequence of the failure to comply with it would simply be retraction of the defendant's waiver of

speedy trial rights that was the *quid pro quo*. The District Court would have no authority to create a mini-Speedy Trial Act by judicial fiat, binding itself to dismissing the prosecution in advance of the time the Speedy Trial Act would allow, and even against its own judgment of what justice required. At most, then, Hansen reacquired his previously waived Speedy Trial Act rights on March 20. Since those rights would still not have entitled him to dismissal, because of the tolling of the seventy-day period described above, commencement of the trial on March 20 was lawful.

* * * * *

We have carefully considered all of Hansen's other arguments and find them to be without merit, substantially for the reasons given by the District Court in its rulings and opinions below. We affirm the conviction on all counts.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5377

UNITED STATES OF AMERICA
v.
GEORGE VERNON HANSEN

(Criminal No. 83-00075)

BEFORE: Ginsburg and Scalia, Circuit Judges; McGowan, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: _____
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5377

UNITED STATES OF AMERICA

v.

GEORGE VERNON HANSEN

(Criminal No. 83-00075)

BEFORE: Robinson, Chief Judge; Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges; McGowan, Senior Circuit Judge

ORDER

The suggestion for rehearing *en banc* of appellant George Vernon Hansen has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:_____
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Wald and Mikva did not participate in this order.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA)
)
v.)
) Criminal No. 83-00075
GEORGE VERNON HANSEN,)
)
Defendant.)

MEMORANDUM OPINION

This matter is before the Court upon defendant's motion to dismiss the indictment in which he is charged with four counts of making false statements in documents within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. §1001. Defendant is alleged to have made false statements concerning his financial status on the financial disclosure reports he was required to file with the United States House of Representatives in 1978, 1979, 1980, and 1981 pursuant to the Ethics in Government Act of 1978 (EIGA), 2 U.S.C. §§701-09. Defendant is a United States Congressman representing the second district of the State of Idaho. Defendant makes three arguments in support of his motion to dismiss: (1) that the financial disclosure requirements of EIGA are not subject to criminal sanctions under 18 U.S.C. §1001 because Congress intended that they be enforced only by civil measures, (2) that the Speech or Debate Clause of the Constitution protects him from any prosecution concerning his EIGA reports, and (3) that he is the victim of selective prosecution. Defendant also has filed a motion for leave to take discovery relevant to the selective prosecution issue. Oral argument on these questions was heard on June 3, 1983. For the reasons which follow, defendant's motions shall be denied.

I. The Applicability of Section 1001 to False Statements Within EIGA Reports

On its face, section 1001 proscribes the conduct allegedly committed by defendant. The section, which has general effect, essentially makes it a crime to knowingly and willfully falsify a material fact or knowingly and willfully make any false, fictitious or fraudulent statement in connection with "any matter within the jurisdiction of any department or agency of the United States."[1] This section embraces false statements made to the House of Representatives. *Diggs v. United States*, 613 F.2d 988, 999 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980). EIGA requires Members of the House of Representatives such as defendant to file with the Clerk of the House of Representatives annual reports of their personal financial status. 2 U.S.C. §§701-03. (Senators, non-voting representatives to Congress, and certain officers and employees of the Legislative Branch are also required to file such reports with the appropriate official.) Section 1001 has been held to prohibit the intentional concealment of material facts by a federal official in the course of completing a financial disclosure statement required by an agency of its employees before the enactment of EIGA. *United States v. Muntain*, 610 F.2d 964, 971 (D.C. Cir. 1979).

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1. Section 1001 provides:

"§1001 Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

"[T]he term 'jurisdiction' should not be given a narrow or technical meaning for the purposes of §1001." Bryson v. United States, 396 U.S. 64, 70 (1969).

Defendant, however, argues that it was the intent of Congress to limit enforcement of the financial disclosure report requirements to civil sanctions set forth in EIGA at 2 U.S.C. §706. That section allows the Attorney General to bring a civil action against anyone who knowingly and willfully falsifies any information in his report or knowingly and willfully fails to file a report.[2] A maximum penalty of $5,000 may be imposed. A provision in the first draft bills of EIGA establishing criminal sanctions for falsified disclosure reports, *see* 123 Cong. Rec. 21007 (1977), was deleted from the act as it was finally passed by both Houses of Congress. Defendant argues that the deletion of the criminal penalties demonstrates Congress' intent that no criminal sanctions should apply to the falsification of EIGA reports.

At the outset, it must be noted that EIGA contains no express repeal or preemption of section 1001 as it applies to falsified disclosure reports. The act does specify that EIGA's provisions "shall supersede and preempt any State or local law with respect to financial disclosure," 2 U.S.C. §708, but nowhere in the act is there an equivalent provision concerning other federal laws.

Nor does anything in the text of EIGA or section 1001 establish an implicit repeal or preemption by the former of the latter as it pertains to falsified disclosure reports. Repeals by implication, of course, are disfavored. *Committee for Nuclear Responsibility, Inc. v. Seaborg,*

2. Section 706 provides:

"§706. Failure to file or filing false reports

The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report pursuant to section 702 of this title. T he court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000. No action may be brought under this section against any individual with respect to a report filed by such individual in calendar year 1978 pursuant to section 701(d) of this title."

463 F.2d 783, 785 (D.C. Cir. 1971).[3] A repeal by implication may be found, however, only where there is "some manifest inconsistency or positive repugnance between the two statutes." *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 565 (1963). Unless "the two acts are irreconcilable, clearly repugnant as to vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation," no repeal will be implied. 1A C.D. Sands, *Sutherland Statutory Construction*, §23.10, at p. 231 (4th ed. 1971). There is no inconsistency between section 706 of EIGA and 18

3. Defendant attempts to avoid the abundant authority disfavoring repeals by implication by characterizing his theory differently: he asserts that his argument is not that section 1001 is repealed by EIGA but that it is "*inapplicable*" to it. This distinction has no substance. Defendant is arguing that a general statute which, as explained above, on its face is controlling, has no force in a particular instance. This is the type of "repeal" that the Court of Appeals said could not be executed by implication in Committee for Nuclear Responsibility v. Seaborg , 463 F.2d at 785. "To assume . . . that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute by carving out an exception to it is, in effect, to accomplish a partial repeal of the general statute." United States v. Burnett, 505 F.2d 815, 816 (9th Cir. 1974), *cert. denied*, 420 U.S. 966 (1975).

United States v. DeLaurentis, 491 F.2d 208 (2d Cir. 1974), upon which defendant relies for the proposition that a general criminal statute may be found inapplicable to conduct regulated by another statute notwithstanding its "plain meaning" is inapposite. That case concerned the use of 18 U.S.C. §241, a criminal statute enacted in 1870 to protect the rights to newly-freed former slaves, as a basis for a prosecution for threats to interfere with activity protected by the National Labor Relations Act. The Second Circuit stated that "[a]lthough the conduct of [the defendants] may have been reprehensible, we do not believe that Congress has made it criminal," 491 F.2d at 209, and found that the victims' rights "must be vindicated exclusively through" the Labor Act. *Id.* at 211. In the instant case, by contrast, the clear purpose of section 1001 is to make a crime the making of false statements to the government in matters including, under *United States v. Muntain*, financial disclosure reports.

U.S.C. §1001. Section 1001 makes it a crime to knowingly and willfullly falsify or conceal a fact, make a false statement, or use a false writing knowing the writing to contain a false statement. Section 706 provides a civil enforcement mechanism for the knowing and willful falsification of an EIGA disclosure report or the knowing and willful *failure to file* such report. Nothing in one statute compels, for example, the commission of an act prohibited by the other; rather, they proscribe the same conduct and complement each other in that the civil statute attacks the lesser offense of non-filing as well as intentional false filing.

Where two statutes concern the same subject, a court considering them must make every effort to reconcile allegedly conflicting provisions and give effect to both, so long as doing so does not deprive one or the other of its essential meaning. *Wilderness Society v. Morton*, 479 F.2d 842, 881 (D.C. Cir.) *cert. denied*, 411 U.S. 917 (1973). Here, however, the prohibitory language of the two statutes does not conflict. As a result, the only matter to "reconcile" is the availability of both civil and criminal remedies for false statements in EIGA reports. This poses no problem, inasmuch as it is established that where a single act violates more than one statute, the government may elect to prosecute under either. *United States v. Brown*, 482 F.2d 1359, 1360 (9th Cir . 1973), citing *United States v. Gilliland*, 312 U.S. 86 (1941). In *Brown*, the Ninth Circuit ruled that, assuming the making of false statements on bid forms was a violation of either of two other false statements statutes, 18 U.S.C. §1010 or §1012, such conduct could also be prosecuted under the general statute, section 1001, with its harsher penalties. *Accord*, *United States v. Burnett*, 505 F.2d at 816 (government had the option of proceeding under 18 U.S.C. §1919, concerning false statements to obtain unemployment benefits for prior federal service, or section 1001).

Defendant also argues that since section 706 does not contain a parallel provision to that in section 704 of EIGA which provides that the Attorney General's authority to bring a civil action to enforce Section 704 "shall be in addition to any other remedy available under statutory or common law," section 1001 may not apply to the filing of false EIGA reports. Section 704 regulates the public's accessibility to filed EIGA reports. It makes it unlawful to obtain or use an EIGA report for any unlawful purpose, for any commercial purpose (outside the news media), to determine credit ratings, and for the solicitation of money. 2 U.S.C. §704(e)(1). The civil remedy under section 704 pertains to such proscribed uses of EIGA reports. 2 U.S.C. §704(e)(2). The language in section 704(e)(2) preserving other remedies protects the rights of filers of EIGA reports to bring suit on any private cause of action arising from the misuse of their financial disclosure information. As there is no parallel private right with respect to the requirement in section 702 to file correct reports, there is no proper analogy between section 706 (which enforces section 702) and section 704.

Nor does section 705 of EIGA, which provides that a person who relies on an advisory opinion by the appropriate congressional committee in making his disclosure report "shall not . . . be subject to any sanction provided in this chapter," preclude the instant prosecution under section 1001. First, there is no assertion that defendant prepared the disclosure reports in question in reliance upon any such advisory opinion. Second, section 705 unambiguously limits its forgiveness provision to sanctions under EIGA and does not purport to preempt other remedies such as section 1001. 2 U.S.C. §705(b).

The plain language of the two statutes shows no "manifest repugnance," no conflict that would indicate an implied repeal. It has been held that under such circumstances the inquiry ends at this point; that it is improper to turn to legislative history to look for a repeal by implication. *Demby v. Schweiker*, 671 F.2d 507, 510

(1981) (Opinion announcing judgment of the court by MacKinnon, J., with one judge concurring in the result). In any case, as explained below, an exploration of the relevant legislative history does not yield support for defendant's contention that Congress intended section 1001 not to apply to the acts he is alleged to have committed.

Because EIGA and section 1001 are not irreconcilable, there must be an affirmative showing of an intention to repeal before the Court may find the criminal provision repealed by implication. *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 366 (D.C. Cir.), *cert denied*, 454 U.S. 1092 (1981). Next to the statute itself, the conference report of a bill is the most persuasive evidence of congressional intent, since it represents the final statement of the terms agreed to by both Houses. *Demby v. Schweiker*, 671 F.2d at 510 (Opinion by MacKinnon, J.). However, because the conference report of S. 555 (the bill which became EIGA), 124 Cong. Rec. 35650-72 (1978), does not discuss the deletion of the previously proposed criminal provision or the applicability of other criminal sanctions to the act, *see id.* at 35668, the parties have referred only to statements of individual Representatives in the debates.

The original Senate bill (S. 555) and various House bills preceding the enactment of EIGA contained both a criminal penalty for knowing and willful falsifications and a civil penalty for misstatements. The criminal penalties were deleted and the requirements for civil sanctions were made more stringent during deliberations on the act in the House, apparently during discussions on H.R. 13850, a proposed substitute bill. In response to defendant's argument that the deletion of the criminal penalty indicates Congress' intent that no criminal sanctions apply to EIGA, the government contends that it just as logically could be argued that the criminal penalty was removed because section 1001 rendered it superfluous and that the requirements for the civil sanctions were

heightened because of a concern that Members of Congress would be exposed to nuisance suits for inadvertent errors on their disclosure reports.

None of the statements in the legislative history referred to by defendant provide unequivocal support for his argument. Defendant quotes Representative Danielson who, discussing the particulars of H.R. 13850, noted that

> provisions of the bill do not provide for a criminal penalty but do provide for a civil penalty for failure to comply with the disclosure provisions.

124 Cong. Rec. 30414 (1978). This remark does not discuss the applicability of section 1001, and indeed does not specifically refer to false statements. It merely notes what sanctions are and are not contained within EIGA itself. The statement of Representative Moorhead that the notable improvements of the substitute bill included "the deletion of *unnecessary* criminal penalties with respect to [the] financial disclosure section," 124 Cong. Rec. 30415 (1978) (emphasis added), does not compel the conclusion that Congress felt that it was unnecessary to include criminal penalties because civil sanctions would achieve the desired result. That Congressman equally could have meant that the penalties were unnecessary because of the existence of section 1001.

Likewise, Representative Shchroeder's observation that "there is no specific criminal sanction for misfiling," 124 Cong. Rec. 30419 (1978), refers to the provisions of EIGA and does not speak to the *general* criminal sanction of section 1001. Her comments at 124 Cong. Rec. 30422 (1978) under the heading "Failure to File or Falsifying Reports," to the effect that under EIGA intentional violations would be prosecuted by the Attorney General under what is now section 706 and that technical or inadvertent violations should be resolved informally, similarly present nothing addressing the applicability of criminal sanctions.

The statements of Representative Preyer at 124 Cong. Rec. 30425 (1978) cited by defendant note that under the bill's compliance and enforcement provisions Members of Congress would "not be subject to any civil penalty under the act for inadvertent error or omisison in the disclosure." Again, this does not address the question of whether EIGA would not be covered by other criminal sanctions but simply assures the Members of Congress that they would be protected from civil suits for minor, unintentional errors or omissions in their disclosure reports. Similarly, Representative Frenzel's remark that "now that the criminal penalties have been removed from this legislation, against my wishes, I might add, there is only a civil penalty to deter a potential nondiscloser," 124 Cong. Rec. 30430 (1978), is consistent with the applicability of section 1001 inasmuch as the criminal statute would not apply to failures to file. Nor does Representative Gonzales' comment that "it is not a criminal offense to file incorrect information," 124 Cong. Rec. 32013 (1978), suggest that section 1001 was intended not to reach the alleged conduct at issue in the instant case: the mere filing of incorrect information does not meet the requirements for a conviction under section 1001. Representative Bauman's comment that the enforcement provision of EIGA "would have been a criminal penalty, but it was changed to get the bill through the House," 124 Cong. Rec. 30457 (1978), likewise says nothing about section 1001.

Defendant simply has failed to make the "affirmative showing" of an intent to repeal required by *Izaak Walton League*. Moreover, the only statement in the legislative history of EIGA specifically referring to section 1001 is contrary to his argument . Representative Wiggins, who, according to defendant, was the Ranking Minority Member of the Select Committee on Ethics when the legislation was being developed, had this to say in the context of the removal of the act's criminal penalty for falsified disclosure statements:

> Some Members have been concerned about their criminal liability. Well, they should be concerned about their criminal liability. I hope they have not been led to believe that by eliminating the criminal sanctions in this bill they have been relieved of vulnerability, because they have not.
>
> Title 18 contains a section 1001 which makes it a felony subject to 5 years' imprisonment to willfully and knowingly file a false document or false statement. That is general law. It continues in effect, and that will apply with respect to the statements filed here. Therefore, even though there are no explicit criminal penalties in this bill, the Members will all be subject to criminal penalties if the Attorney General elects to proceed under 18 U.S.C. 1001.

124 Cong. Rec. 30429 (1978).[4] Representative Wiggins

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4. Representative Wiggins went on to present this hypothetical:

"Let me give the Members a little scenario on how this is apt to apply. You file your statement, you make a good faith estimate of the value with respect to an asset you own. It is a good faith estimate in your own mind, but one of the persons who reads your statement is an opponent or a member of the press. He does not agree that your estimate is in fact in good faith; he thinks it is grossly understated. The press or your opponent goes to a U.S. attorney and says that he believes you have made a willfully false statement because you have significantly understated the value of an asset on your report.

"What is the position of the U.S. attorney? He has a hot potato in his hand. He has a Member of Congress who is being accused. If he pooh-poohs the allegation, he fears the publicity of cover-up, particularly if the complaint comes from the press. On the other hand, if he proceeds, he fears the problem of discrimination against a sitting Member of Congress, political manipulation, and the like.

"What does he do? Well, I will tell the Members what the typical U.S. attorney will do. He will pass the buck to the grand jury. He will in effect say, 'I am not going to decide this difficult case. He will let the grand jury make a decision.'

"Well, that is just hunky-dory, is it not? That means that whatever your legal difficulty, you are in deep trouble politically,

also made reference to the applicability of general criminal statutes in the United State Code to EIGA during a discussion of a proposed amendment directed at Members who knowingly permit the use of House stationery for fundraising activities. 124 Cong. Rec. 30444 (1978). Representative Thompson reacted to this point by noting that Wiggins had "made a very important point" that "this does become a part of the United States Code, that it does involve a criminal penalty." *Id.*

It is clear from the Congressional Record that Representative Wiggins was a relentless opponent of financial disclosure requirements and that the Supreme Court has "often cautioned against the danger when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB v. Fruit and Vegetable Packers and Warehousemen,* 377 U.S. 58, 66 (1964). Yet Representative Wiggins' statement constitutes the *only* pronouncement on the relevance of section 1001 to falsified disclosure reports; there simply are no remarks whatsoever from any of the bill's proponents to turn to as "more accurate" explanations of its effect than Wiggins'.[5] Furthermore, the Congressional Record

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with the grand jury being impaneled to consider a complaint made against you with respect to a misstatement or alleged misstatement filed under this section.

"So I am only reminding the Members of the vulnerability they are assuming for themselves if they adopt these provisions."

124 Cong. Rec. 30429 (1978).

5. During the final, rapidly-passing minutes of his rebuttal to the government's oral argument, defendant's counsel suggested a legislative history matter that he neither addressed in his oral argument nor his papers filed with the Court. Counsel stated that "when they [Members of the House] were discussing civil suits filed against them, so on an[d] so forth, an amendment was actually introduced to permit 1001 to survive under these circumstances, introduced, I believe, by Congressman Panetta, and that was defeated by the House. So with 1001 in front of their eyes and everything else,

shows that not one Member rose to dispute what Wiggins had to say.

Representative Wiggins was not the only Member interested in the effect of criminal provisions of the United States Code upon EIGA's financial disclosure report requirements. Representative Preyer, who was the Chairman of the Select Committee on Ethics at the time, asked the Department of Justice in April 1978 for an advisory opinion on this very question as it pertained to reports filed by Executive Branch employees. A reply came in the form of a letter from then-Assistant Attorney General for Legislative Affairs Patricia M. Wald. In her letter, Judge Wald stated that it was the Justice Department's opinion that section 1001 "would apply to an Executive Branch employee who knowingly and willfully falsified a material fact in a financial disclosure statement required by bills such as [those under consideration]." Exhibit B to Government's Amended Response to Motion to Dismiss, at 2. Representative Preyer had the benefit of this opinion when he made the remarks quoted from the Congressional Record above. It is further apparent from Judge Wald's letter that Representative Preyer had also been advised by the Clerk of the House of his opinion "that the knowing and willful falsification of a material fact on a statement required to be filed by a Member of

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NOTES *(Continued)*

they excluded a criminal sanction . . . ." (Unofficial excerpt of transcript prepared for Court by Court Reporter).

The amendment to which counsel evidently referred appears at 124 Cong. Rec. 32009 (1978). It provided for a complaint procedure similar to those under federal election laws by which any person could report a violation of EIGA to the Office of Government Ethics. The amendment, as offered by Representative Panetta, stated that "[a]ny person filing such a complaint shall be subject to the provisions of section 1001 of Title 18, United States Code." *Id.* It did not concern the applicability of section 1001 to disclosure reports, nor was that issue raised during any part of the debate on the amendment. 124 Cong. Rec. 32209-11 (1978).

Congress, congressional employee or candidate for Congress would subject the reporting individual to the provisions of 18 U.S.C. §1001." *Id.* at 1.[6]

The inescapable conclusion is that Congress simply did not intend to render section 1001 inapplicable to the intentional falsification of EIGA financial disclosure reports — otherwise, a specific repealing or exempting clause would have been included in the act. Indeed, the form issued by the Clerk of the House upon which Members of Congress are to make their financial disclosures carries at the signature line the following warning:

> NOTE: Any individual who knowingly and willfullly falsifies, or who knowingly and willfully fails to file this report may be subject to civil and criminal sanctions. See 2 U.S.C. §706 and 18 U.S.C. §1001.

Exhibit A to Government's Amended Response to Motion to Dismiss, at 1. At the hearing, the parties were unable to advise the Court precisely from where came this language other than to opine that it was placed on the form by the Office of the Clerk of the House, nonetheless it evidently has appeared on such forms for a number of years without question from the many Members of Congress and legislative employees who have had occasion to execute the document.[7]

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6. Counsel for the government stated at oral argument that the government attempted to obtain the opinion of the Clerk of the House but was unable to do so because it is an "internal document."

7. A memorandum from the Clerk of the House to "All Members, Officers and Employees Required to File Financial Disclosure Statements Under Rule XLIV [of the House of Representatives]," a copy of which was submitted to the Court on June 8, 1983 by defendant, advised of the instant prosecution and stated that "this office takes no position on [the] question" of "whether [section 1001] applies to filings under the Rule." (In Rule XLIV, section 2, the House adopted the financial disclosure obligations of EIGA as its own internal rule.)

This memorandum has no bearing on the matters at issue here.

II. The Relevance of the Speech or Debate Clause to Reports Filed by Legislators under EIGA

Defendant argues that the filing by Members of Congress of financial disclosure reports under EIGA constitutes "legislative activity" protected by the Speech or Debate Clause of the Constitution.[8] It does not. The Speech or Debate Clause protects Members of Congress from judicial inquiry into their legislative acts or the motivation for the actual performance of their legislative acts. *United States v. Brewster*, 408 U.S. 501, 509 (1972). The filing of an EIGA report is not a "legislative act," nor bears upon a legislator's motivation for any legislative act.

Brewster was the prosecution of a former United States Senator indicted under a general criminal statute for allegedly accepting a bribe in exchange for a promise relating to an official act, *i.e.*, agreeing to vote a particular way on certain legislation. The Supreme Court held that the Speech or Debate Clause would not preclude the Senator's prosecution because an examination of the indictment and the criminal statute upon which it was based "reveal[ed] that no inquiry into legislative acts or motivation for legislative acts [was] necessary for the Government to make out a prima facie case." 408 U.S. at 525.

NOTES *(Continued)*

No matter what the opinion of the Clerk of the House might be at the present about section 1001's relevance to financial disclosure requirements, the memorandum does not alter the fact that the Clerk of the House in 1978 evidently put the Chairman of the House Select Committee on Ethics on notice that the section would apply to reports filed pursuant to EIGA. Moreover, the memorandum only refers to section 1001's effect on statements required by the internal House Rule — it carefully avoids mention of the section's applicability to reports compelled by EIGA.

8. The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. Const. art I, §6.

Defendant asserts that because the Constitution confers upon each House the authority to discipline its members, U.S. Const. art. I, §5, and because the House may discipline its members for matters relating to financial disclosure reports filed with its Clerk, the filing of such reports falls within the protection afforded "legislative activity" by the Speech or Debate Clause. *Gravel v. United States*, 408 U.S. 606 (1972), cited by defendant, does not support this proposition, nor does *Brewster*, decided the same day. In *Gravel*, the Supreme Court declared that

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either house, but "only when necessary to prevent indirect impairment of such deliberations."United States v. Doe, 455 F.2d [753], at 760 [(1st Cir. 1972) (same case as *Gravel*)].

408 U.S. at 625. Defendant has not shown, nor can this Court devine, any reason why the instant prosecution for false statements should cause "indirect impairment of such deliberations." Nor does this prosecution "threaten the integrity or independence of the [House] by impermissibly exposing its deliberations to executive influence." *See id.* Furthermore, the Speech or Debate Clause "does not privilege [a Member of Congress] to

violate an otherwise valid criminal law in preparing for or implementing legislative acts." *Id.* at 626.

"The question is whether it is necessary to inquire into how [defendant] spoke, who he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute." *Brewster*, 408 U.S. at 526. This prosecution does not make it necessary to inquire into any of these areas because it only refers to defendant's statements on his financial disclosure report, statements which this Court holds are simply outside of the deliberative and communicative functions of the House.

The Second Circuit came to the identical conclusion in *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3853-54 (May 31, 1983). In that case, involving the prosecution of several Members of Congress arising from the "Abscam" operation, Representative Lederer objected to the introduction at trial of his EIGA financial disclosure report, asserting that it was privileged under the Speech or Debate Clause. In that report Lederer falsely listed his share of a bribe as a "consulting fee." *Id.* at 849. The court held that the report was not privileged by the clause, stating that

> Though the Clause, in covering "legislative acts," *Gravel v. United States*, 408 U.S. 606, 625, 92 S.Ct . 2614, 2627, 33 L.Ed.2d 583 (1972), extends beyond words spoken during legislative debate any other matters it reaches "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings. . . ." *Id.* Disclosure of income from sources other than employment by the United States, *see* 2 U.S.C. §702(a)(1)(A), is no part of such "deliberative and communicative processes."

Id. (citations omitted). In reaching this holding, the court also noted that "[p]rosecutions for falsification of

similar statements indicate that Lederer's financial disclosure statement was not shielded [by the Speech or Debate Clause]." *Id.*, citing *United States v. Bramblett*, 348 U.S. 503 (1955) (prosecution for false statement to House Disbursing Office); *United States v. Diggs*.

Defendant places heavy reliance on *United States v. Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1980). There, the court ruled that the testimony of a Member of Congress before the House Ethics Committee was privileged by the Speech or Debate Clause, citing language in *Gravel* to the effect that a Member's conduct at committee hearings is "within the sphere of legitimate legislative activity." *Gravel*, 408 U.S. at 624, *quoted in Eilberg*, 465 F. Supp. at 1083. The committee, the *Eilberg* court stated, "was engaged in the very function the Speech or Debate Clause protects — the right of Congress to preserve its independence by disciplining its own members. This right to discipline is one of the matters 'which the Constitution places within the jurisdiction of either house.' " *Eilberg* , 465 F. Supp. at 1083, *quoting Gravel*, 408 U.S. at 625.

The portion of *Gravel* quoted by the *Eilberg* court is within the extended quotation from that case above in this Memorandum Opinion. When the brief passage is read in context, it is clear that to the extent that the privilege embraces such "other matters" within the House's jurisdiction, it only applies *"when necessary to prevent indirect impairment of such deliberations."* *Gravel*, 408 U.S. at 625 (emphasis added). It is difficult to see how applying the Speech or Debate Clause privilege to the *Eilberg* defendant's *testimony* — as opposed to the Committee members' statements and questions — could have been "necessary" to prevent impairment of the Committee's deliberations. The mere fact that Congress may provide some internal inquiry or sanction for certain misconduct of its members does not thereby insulate its members from all possible criminal liability for such actions. In any case the facts of *Eilberg* are distinguishable

from those of the instant matter, which does not involve any statements made on the floor of the House.

Any suggestion that Congress intended that discipline of members for failures to comply with EIGA's provisions be kept an in-house matter is completely belied by the fact that Congress specifically opened the act's disclosure requirements up to external scrutiny by vesting in the Attorney General the authority, under section 706 of the act, to bring civil actions to prosecute violations of those requirements. Moreover, that EIGA is a three-branch plan in which officials of the executive and judicial branches have equal disclosure obligations to those of legislative branch officials demonstrates that the disclosure requirements have a broader purpose than mere internal policing but also concern the public's right to know about the financial interests of its governmental leaders.

Accordingly, the Speech or Debate Clause does not privilege defendant from prosecution for the matters alleged in the indictment. The government can make out a prima facie case without having to inquire into any legislative acts or the motivation therefor. The remaining question relevant to this issue is whether defendant has the right to an immediate, pretrial appeal of this portion of this Court's decision.

The government acknowledges that pretrial appeals from denials of motions to dismiss generally are permissible under the rule of *Helstoski v. Meanor*, 442 U.S. 500 (1979). In fact, the Supreme Court held in that case that a pretrial motion rejecting a Speech or Debate Clause defense is a "final decision" creating appellate jurisdiction under 28 U.S.C. §1291. 442 U.S. at 506. Nevertheless, the government suggests that the Speech or Debate Clause defense asserted in this case is frivolous, and therefore contends that despite *Helstoski* no pretrial appeal is available.

There apparently is no precedential authority for the proposition that *Helstoski* does not apply to a frivolous

Speech or Debate Clause defense. As such, the government relies on analogy to a line of cases beginning with *United States v. Dunbar*, 611 F.2d 985 (5th Cir.), *cert. denied*, 447 U.S. 926 (1980), concerning pretrial appeals of denials of "frivolous" double jeopardy motions made pursuant to the rule of *Abney v. United States*, 431 U.S. 651 (1977).

Under the *Dunbar* rule, an appeal of a denial of a double jeopardy motion does not divest the District Court from jurisdiction to proceed with the trial of the case where the District Court makes a written finding that the appeal is frivolous. 611 F.2d at 989.

Defendant aptly points out a significant problem with this analogy. Unlike Speech or Debate claims, which only may be raised in prosecutions having some relation to Congress' legislative functions, double jeopardy arguments conceivably can be raised in any type of case where circumstances warrant. The likelihood of abuse of the appeal right through the assertion of frivolous claims is much greater in the *Abney* context. *See United States v. Brizendine*, 659 F.2d 215, 225-26 (D.C. Cir. 1981) (noting suspected abuse of double jeopardy claims in the Ninth Circuit). Accordingly, this Court is not persuaded that the *Dunbar* rule should apply to the denial of a motion to dismiss based on Speech or Debate Clause arguments.

The lack of precedent regarding frivolous pretrial appeals on Speech or Debate grounds and this Court's view of what the rule should be do not, of course, preclude this Court from entering written findings, if appropriate, as to whether the appeal is frivolous. Yet although the Court finds defendant's arguments on this issue unpersuasive and devoid of merit, the Court nonetheless declines to make such findings. Considering that the suggested potential for abuse of the appeal right in double jeopardy cases (or at least the magnitude thereof) is not present in

cases such as this, the Court does not find it appropriate to rely here upon the standards for determining an appeal "frivolous" in those cases.

III. Selective Prosecution

Defendant argues that he was singled out for prosecution because of his history of confrontation with and criticism of the executive branch. He asserts that this constitutes a violation of his right to equal protection of the law under the fifth amendment to the Constitution. He also seeks discovery on the issue of selective prosecution. Defendant has failed to establish even a colorable claim of unconstitutional selective prosecution. As a result, the defendant's argument that the indictment should be dismissed on this ground is rejected and his request for discovery on the issue is denied.

There is a two-pronged test for establishing a prima facie case of selective prosecution: (1) that others similarly situated were not prosecuted (*i.e.*, there was a selection) and (2) the decision to select the defendant for prosecution was improperly motivated. *E.g.*, *Attorney General of the U.S. v. Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 817 (1983). Accordingly, while some forms of conscious selection are permissible, *United States v. Diggs*, 613 F.2d at 1003, "[t]wo kinds of motives [for selection] are apparently impermissible: those which have no rational basis under the statutory scheme being enforced, and those which are in and of themselves violative of the Constitution." *Irish People*, 684 F.2d at 935. Discovery on the issue is permitted only where the defendant can make a "colorable claim of discriminatory prosecution." *Diggs*, 613 F.2d at 1003 n.87.

Defendant has failed to show that there has been any selection. He has not directed the Court's attention to anyone *similarly* situated who has not been prosecuted.

Defendant makes reference to a report of the Comptroller General dated May 30, 1980 and has provided a copy of another report of the Comptroller dated March 4, 1981 to the effect that numerous persons subject to the requirements of EIGA failed to file their reports timely. Motion to Dismiss at 62; Exhibit II to Motion to Dismiss. He asserts that none of these (unidentified, it should be noted) persons were investigated by the Justice Department and that this demonstrates discrimination. It does not. None of these people could be prosecuted under section 1001 since that statute does not apply to mere failures to file.

Next, defendant asserts that the government's failure to prosecute the Attorney General for an erroneous EIGA report proves discrimination. Yet defendant acknowledges that the Attorney General filed an amended report to correct the error. Motion to Dismiss at 63 n.7. Accordingly, he and the Attorney General are not "similarly situated."

In his reply brief defendant submits that information in the March 1981 Comptroller General report concerning inaccuracies and omissions in pre-EIGA financial disclosure reports filed in 1978-79 pursuant to Senate Rule 42 demonstrates improper selection. Yet as those persons were not subject to EIGA, again, their position is not the same as defendant's.

Defendant also comments on various other prosecutions of Members of Congress, including the Abscam prosecution of Representative Lederer in *United States v. Myers*, asserting that they could have been, but were not, prosecuted under section 1001 for false statements in EIGA reports. Defendant emphasizes the Second Circuit's statement in *Myers* that Lederer "falsely listed [on his disclosure report] his $5,000 share of [a] bribe as 'a consulting fee.' " 692 F.2d at 849. But he and the others *were* prosecuted for other, more serious offenses. The fact that the government did not add every conceivable offense to the Abscam indictments does not show that

those defendants were treated more leniently than the defendant in the instant case.

As defendant has made no colorable showing that he was singled out for prosecution his request for dismissal of the indictment on this ground as well as his motion for discovery are denied. Nonetheless, it can be observed that there appears to be no basis whatsoever for defendant's contention that the government harbored an improper motivation for initiating this prosecution. As noted above, in *Diggs* the Court of Appeals discerned two kinds of improper motives for selection: those lacking a rational basis under the statute being enforced and those inherently offensive to the Constitution. 613 F.2d at 1003. There can be no serious doubt that this prosecution has a rational basis under both EIGA and section 1001. Prosecuting false statements in EIGA reports is consistent with EIGA's purposes which include, *inter alia*, deterring conflicts of interest and maintaining a high level of integrity among public officials. *See* S. Rep. No. 170, 95th Cong., 1st Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4216, 4237-38. It also is consistent with the purpose of section 1001 to ensure that people do not intentionally make false statements to agencies and departments of the government.

Instead, defendant argues generally that the government is out to punish him for exercising his rights under the first amendment to speak out against the executive branch and, in particular, the Internal Revenue Service. However, none of the numerous materials defendant has presented as exhibits to his motion support this contention in any way. While he provides a vast number of documents of his own creation — letters to various officials, essays submitted by him to the Congressional Record, books critical of the IRS — chronicling his own crusades, but a few of the papers submitted concern the executive branch's responses to his activities. In not one of these documents is there any evidence that the government harbored a desire to punish defendant for speaking out.

One of these communications is a copy of a letter from the then-Commissioner of Internal Revenue to defendant, dated February 24, 1978, in response to defendant's letter to the Commissioner alleging numerous improprieties on the part of the IRS. The Commissioner's letter demonstrates no hostility whatsoever, but on the contrary is polite and responsive in detail to defendant's allegations. Consistently through the letter the Commissioner assured defendant that his charges would be investigated once defendant would provide more specificity as to his allegations. At oral argument defendant's counsel referred to this letter as "virtually a threat," asserting that it warned defendant to cease "hurting the morale" of IRS employees. The only portion of the Commissioner's letter to which this possibly could refer is the last paragraph, which reads:

> I have tried to be responsive to your concerns and assure you that the Service will not tolerate discrimination in either its personnel policies or its examination policies based upon religion. Any facts at all to support your allegations in this regard should be made known to me. Generalized allegations do a disservice to the thousands of dedicated people who make up the Internal Revenue Service.

Exhibit II to Motion to Dismiss. This is not a threat. Nor does it demonstrate any antagonism on the part of the Commissioner, the IRS or the executive branch toward defendant.

Similarly, the letters from the Assistant Attorney General of the Justice Department, Criminal Division, to defendant dated December 11, 1981 and February 8, 1982 concerning other allegations of IRS misconduct provide no support to defendant's assertion that the government has a vendetta against him. *See* Exhibit VIII to Motion to Dismiss. The letter from the Chairman of the Securities and Exchange Commission to defendant dated January 14, 1983 likewise is innocuous.

For the foregoing reasons, and upon consideration of the entire record in this matter, defendant's motion to dismiss the indictment and his motion for discovery as to the question of selective prosecution shall both be denied.

It is this Court's respectful view that as the Speech or Debate Clause issue is immediately apealable, it would be more efficient for the Court of Appeals to consider the other two issues raised in the motion to dismiss at the same time. In *United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir.) (pretrial appeal), *cert. denied*, 449 U.S. 956 (1980), the Second Circuit not only ruled that a challenge to an indictment on separation of powers grounds was immediately appealable along with the Speech or Debate Clause question, but declared that it "would not be too extravagant to suggest that a Member of Congress should be entitled to pre-trial review of the denial of any legal claim that could be readily resolved before trial and would, if upheld, prevent trial or conviction on a pending indictment." The court noted that circumstances particular to Members of Congress militating in favor of a pretrial appeal of all issues were "especially compelling." *Id.* at 936.

The Court of Appeals for this Circuit has not spoken as to the matters addressed in this dictum from *Myers*. Nonetheless, the inefficiency and delay that piecemeal appeals would cause persuade this Court that the entire matter addressed this date should be submitted to the Court of Appeals at one time. Under 28 U.S.C. §1292(b), the Court of Appeals may in its discretion permit an appeal to be taken from an interlocutory order where the District Court states in writing his opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation ." There is no doubt that an immediate appeal would materially

advance the ultimate termination of this action. The preemption issue raised by defendant obviously involves a controlling question of law inasmuch as if his interpretation of the relevant statutes is correct, there is no basis for the instant prosecution. While the Court is convinced that defendant's reading of the statutes and the legislative history is wrong, various factors noted in his opinion, such as the absence of any reference to criminal sanctions from the conference report, provide substantial grounds for a difference of opinion. Likewise, the selective prosecution question is controlling as it bears directly upon whether the prosecution may properly take place. The Court is hard pressed to say that there is a substantial ground for difference of opinion as to this issue, inasmuch as defendant has not provided *any* concrete evidence to support his claim. Nevertheless, the difference of opinion of the parties is substantial, and to the extent that defendant argues that improper motive may be shown by his own provocative conduct directed against the government, this is his "substantial ground for difference of opinion."

Pursuant to 28 U.S.C. §1292(b), defendant's anticipated application for appeal shall not stay pretrial proceedings in this Court unless so ordered by the Court of Appeals, inasmuch as this Court declines to enter such an order. The trial previously scheduled for June 20, 1983, must however, be continued pending appellate review of the instant decision.

An Order consistent with the above accompanies this Memorandum Opinion.

JOYCE HENS GREEN
United States District Judge

June 13, 1983

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA)
)
v.) Criminal No. 83-00075
)
GEORGE V. HANSEN)

ORDER

Before the Court is the government's motion *in limine* for pretrial rulings on three evidentiary matters.

1. *The Blackmail Attempt.* The government seeks to exclude all evidence pertaining to a blackmail letter received by Nelson Bunker Hunt concerning Hunt's alleged bribery of the defendant in connection with a particular silver futures transaction, on the grounds of irrelevance, confusion and waste of time. The government indicates, however, that Hunt and the defendant brought the letter to the government and thereby triggered this investigation. Indeed, the particular silver futures transaction described in the letter is the subject of Count III of the indictment.

Rule 401 of the Federal Rules of Evidence defines relevance as "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Defendant argues, that the blackmail letter is probative evidence of an innocent state of mind. It is less probable, he asserts, that he deliberately, with criminal intent, omitted the items charged in Counts II-IV of the indictment, if he delivered to the Department of Justice a letter describing one of those items and which would lead to discovery of the other two.

This Court agrees with defendant that his behavior with respect to the blackmail letter is relevant evidence

of his state of mind when he filled out his Ethics in Government Act form. Any confusion or undue delay produced by the introduction of this evidence is substantially outweighed by its probative value and can be minimized by contemporaneous jury instructions. Fed. R. Evid. 403.

2. *Selective Prosecution.* This Court has already ruled against defendant on this issue and defendant agrees that it "has only limited relevance in a jury trial on the merits of the prosecution's charge." Defendant's Memorandum in Opposition to the Prosecution's Motion in Limine at 5. However, defendant argues that his belief that he was a victim of selective prosecution and the possibility that he may indeed have been such a victim, is probative of whether he had the criminal intent to commit the offense charged.

Unlike the blackmail letter, however, the relevance of the selective prosecution claim to defendant's state of mind appears remote at best, and the presentation of evidence on that claim, even limited to its affect on defendant's state of mind, would clearly further complicate this already complicated trial. Defendant has preserved the Court's pretrial ruling on this issue for appeal, if an appeal should be necessary. Moreover, he recognizes that the jury could not acquit him "even if it found that he was unfairly singled out for harassment and prosecution." *Id.* at 6. Accordingly, defendant may not raise the issue of selective prosecution at trial.

3. *The Element of "Materiality" Under 18 U.S.C. §1001.* The government requests that the Court rule that the element of materiality under 18 U.S.C. §1001 is a question of law. Defendant maintains that the materiality of an alleged omission is an essential element of the offense charged in each count of the indictment and that, therefore, the issue should be resolved by the jury. Although not universally accepted, it is well-settled in this Circuit, and in the majority of other Circuits, that materiality is a question for the Court. *Weinstock v.*

United States, 231 F.2d 699, 703 (D.C. Cir. 1956); *United States v. Treadwell*, Cr. No. 82-45; *United States v. Lavelle*, Cr. No. 83-184. *See also United States v. Abadi*, 706 F.2d 178, 180 (6th Cir. 1983); *United States v. McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *United States v. Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *United States v. Clancy*, 276 F.2d 617, 625 7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961). *But see United States v. Irwin*, 654 F.2d 671, 677 n. 8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979).

Defendant attempts to distinguish the *Weinstock* precedent on the ground that its holding is limited to findings of immateriality. Thus if the jury were to find the allegedly false statement or omission material, then the question of whether the evidence sufficiently supported that finding would be for the Court. This unreasonably narrow reading of *Weinstock* permits defendant to have it both ways and the Court will not adopt it.. The principle of *stare decisis* must control this case.

In view of the foregoing, it is by the Court, this *1st* day of March, 1984

ORDERED that the government's motion *in limine* is granted in part and denied in part as follows:

1. Defendant may present evidence of the blackmail attempt;

2. Defendant may not present evidence on the issue of selective prosecution;

3. The question of materiality under 18 U.S.C. §1001 shall be decided by the Court.

JOYCE HENS GREEN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No. 83-00075
GEORGE VERNON HANSEN,	)	
	)	
Defendant.	)	

ORDER

Defendant in this action, Congressman George V. Hansen, was convicted of filing false Ethics in Government Act (EIGA) forms in violation of 18 U.S.C. §1001, after a jury trial which concluded on April 2, 1984. At trial, the defense was based primarily upon the fact that the defendant had acted upon the advice of counsel when he omitted certain items from his EIGA forms, which allegedly negated any criminal intent. Defendant maintains that this defense was established so conclusively as to warrant a judgment of acquittal under Fed. R. Crim. P. 29; when viewed in the light most favorable to the government, the evidence was insufficient to permit a reasonable juror to find guilt beyond a reasonable doubt. *United States v. Durant*, 648 F.2d 747, 750 (D.C. Cir. 1981); *see also United States v. Singleton*, 702 F.2d 1159, 1163 (D.C. Cir . 1983). Defendant has also requested a new trial under Fed. R. Crim. P. 33. He argues that even if the evidence against him could be deemed sufficient to submit the case to the jury, the jury's verdict was contrary to the great weight of the evidence and should be set aside. 2 Wright, *Federal Practice & Procedure (Criminal)* 2d, §553 (1982). In support of his Rule 33 motion, Mr. Hansen reiterates his position that his reliance upon the advice of counsel negated any criminal intent. In addition, defendant argues that a new

trial should be granted because: he was prejudiced by the sequestration of the jury; the jury was prejudiced by the testimony of t he legal expert; the prosecution introduced evidence which was not properly authenticated and irrelevant; and the jury was prejudiced by inflammatory and inaccurate remarks made by the prosecutor in closing argument.

Advice of Counsel

Defendant emphasizes that this Court has seen and heard the two attorneys who testified on his behalf. He is correct that the printed record in this case cannot adequately convey the demeanor and credibility (or lack of it) of those individuals to an appellate court. From the adversarial manner of their responses, the context in which defendant's request for advice arose and the implausibility of the advice which casts doubt on defendant's good faith in relying on it and on whether it was actually based upon a good faith review of the law, the jury could have readily and reasonably rejected the testimony of defendant's attorneys and with it the advice of counsel defense. Accordingly, because there was substantial evidence from which a reasonable juror could find guilt beyond a reasonable doubt, defendant's Rule 29 motion which is premised entirely on the advice of counsel defense, must be denied. Similarly, that part of defendant's Rule 33 motion relating to the advice of counsel defense must also be denied because the verdict was not against the great weight of the evidence on that issue.

To prevail in the defense of advice of counsel, defendant must establish that he sought legal advice in good faith, that he disclosed to his attorneys all material facts, and that he strictly followed the attorneys' advice, in good faith, believing it to be correct. *E.g.*, *Williamson v. United States*, 207 U.S. 425, 453 (1908). The Court's

instruction on the governing law was concededly accurate. (Tr. 1956-1957.) John Runft, defendant's attorney in Idaho, testified that the Hansens approached him for a reasonable interpretation under EIGA that would allow the Congressman to continue not to report his wife's income. (Tr. 1084.) Runft had advised defendant in the past concerning a legal method for raising funds to retire his political debt. Runft authored the property separation agreement between the Hansens, which was a key piece of evidence in this case. Pursuant to defendant's request, the House Ethics Committee later issued an advisory opinion which disapproved of this proposed fund-raising method. (Tr. 1014-1016, 1017-1024, 1027-1028, 1046-1047, D's Exhs. 31, 35). In this instance, Runft advised defendant that in light of the property separation agreement, Section 702(d)(2) of EIGA provided a basis for him not to file information concerning his wife's income. Runft further advised defendant that because the Act was new, and that his interpretation could be wrong, defendant should keep the Select Committee on Official Conduct of the House of Representatives advised of what was being done. (Tr. 1086-1087.)

The jury was informed that EIGA specifically provides for advisory opinions interpreting its provisions upon request, and that reliance upon an advisory opinion is an absolute defense to sanctions under the Act. (Tr. 1599-1600.) Defendant did not seek an advisory opinion from the Committee about the meaning of Section 702(D)(2), nor did he advise the Committee about the *interpretation of EIGA* he was relying upon to omit items from his financial disclosure statements. Defendant had merely notified the Committee about the existence of the property separation agreement, (D's Exh. 38); it was his position (presented through Mr. Runft's testimony) that it was the Committee which then had the burden to advise him that "This is not the right way to go." (Tr. 1087.)

This unique context in which defendant sought and obtained legal advice provided a reasonable basis for the jury to conclude that defendant acted in bad faith. The very questionable nature of the advice given casts doubt on defendant's good faith in reliance upon it without pursuing the Committee's opinion directly. The jury could have reasonably concluded that defendant guessed that the Committee's opinion would be unfavorable.

Moreover, although defendant's attorneys claimed they would give the same advice today with knowledge of facts they lacked at the time, at the time they gave their advice they knew little about the particular amounts or transactions defendant desired to omit from his EIGA forms. Their position, with respect to Counts II—IV of the indictment, was and continues to be, that the Hansen's property separation agreement affixed the rights and liabilities of George and Connie Hansen as to each other's income and property, regardless of any failure physically to separate property and accounts. Thus, the existence of the agreement was the only material fact giving rise to their conclusion that defendant could invoke Section 702(D)(2). With respect to Count I of the indictment James McKenna testified that his advice not to report those loans did not depend on whether the Congressman had kept the money borrowed for the Association of Concerned Taxpayers (A.C.T.) in a bank account until it was used, nor on whether he knew any details about the loans.

However, the jury could have reasonably concluded from the overwhelming evidence, that the Hansens' economic lives were not truly separate, that Congressman Hansen personally used money intended for A.C.T. and then received another loan which accounted for most of the money that later went into A.C.T., and that these facts were material to the attorneys' analyses of what the law required. Defendant's witnesses cannot decide for themselves what unknown facts were then material to their determination no matter how repeatedly they now

stress their immateriality. Indeed, the continual and adamant insistence on the immateriality of this information could easily have convinced the jury of just the opposite.

Finally, relying upon *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3828 (May 15, 1984), defendant maintains that the existence of a highly debatable legal question on the meaning of Section 702(D)(2) precludes a finding of criminal intent to violate EIGA. However, Runft and McKenna are the only known adherents to their interpretation of that section, with the exception perhaps, of the defendant. Their interpretation is, to this Court, contrary to the plain meaning of the statute, its legislative history, its purpose, and common sense. Even without benefit of legal training the jury could reasonably have disbelieved it. Absent any genuine controversy concerning the meaning of Section 702(D)(2), the *Dahlstrom* case is inapposite.[1]

Sequestration

On the morning of trial, counsel for defendant alerted the Court of the considerable unexpected publicity concerning Attorney General-designate Edwin Meese and the striking parallels between the allegations surrounding Meese and those surrounding Hansen. Defendant, by counsel, then moved for a change of venue, or in the alternative, for a continuance of the trial date. The Court denied defendant's motion on the ground that

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1. Curiously, in another part of his argument defendant distinguishes two precedents on the ground that they were "limited to a peculiar and isolated situation—the objective uncertainty of the law—which has no applicability to this case. Here, Congressman Hansen has not defended himself by claiming that the EIGA was so vague and uncertain that his course of conduct was proper." Defendant's Motion for a New Trial at 36 n.13. This concession would appear to undercut defendant's reliance on *Dahlstrom*.

neither of those two "remedies" would remove the prejudice caused by this publicity as assuredly as would sequestration. The Meese matter was receiving substantial national news coverage and the possibility that this publicity would abate in a few days or in another jurisdiction was purely speculation at the time.[2]

The decision to sequester the jury to guard against publicity is "entrusted to the discretion of the trial judge." *United States v. Johnson*, 584 F.2d 148, 154 (6th Cir. 1978), *cert. denied sub nom., Monger v. United States*, 440 U.S. 918 (1979). Sequestration in this instance served the substantial public "interest in having guilt or innocence decided by a jury free from prejudicial influences," *United States v. Haldeman*, 559 F.2d 31, 85 n.135 (D.C. Cir. 1976), *cert. denied sub nom., Ehrlichman v. United States*, 431 U.S. 933 (1977), and did not require the defendant's consent. *Baker v. United States*, 401 F.2d 958, 967-68 (D.C. Cir. 1968).

Defendant agrees that jury sequestration may be appropriate in some instances, but not in this case, "where the question of guilt or innocence was so very close and the sequestration was sufficiently long to inject into the deliberation process significant psychological factors which undermined the purpose and function of the jury trial to the prejudice of defendant." Defendant's Motion for a New Trial at 16. Defendant has now produced with this motion for a new trial, the affidavit of a clinical psychologist, Lawrence I. Sank, which details these psychological factors. The Court recognized at the time of its ruling that sequestration is in many ways undesirable because it creates an artificial environment and, thus, the remote possibility of skewed decisionmaking. Both

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2. While the jury panel waited, defendant immediately petitioned the Court of Appeals for this Circuit for a writ of mandamus. The Court of Appeals denied the writ in short order.

parties believe that that possibility hurts them. Nonetheless, after defense counsel illuminated the danger in proceeding without sequestration, the Court concluded that sequestration was necessary in this case to ensure a fair trial.

Legal Expert

Defendant's main witnesses, Runft and McKenna, testified as attorneys that their interpretation of EIGA, based upon a review of the statute, its legislative history and its policy, provided a basis for the defendant not to report his wife's financial transactions. (Tr. 1084, 1086, 1492.) In rebuttal, the government offered the testimony of David R. Scott, Chief Counsel for the Office of Government Ethics, who had been qualified as an expert on the substance and content of EIGA, in its case in chief. Scott's testimony challenged the interpretation of EIGA given by Runft and McKenna, based upon the same source materials. His testimony was intended by the government to impeach the credibility of defendant's witnesses and to raise the question of whether or not Hansen acted in good faith in relying on his attorneys' advice. The jury was properly instructed that it could give Scott's testimony whatever weight it felt it deserved, accounting for any bias he might have toward the government, and that, indeed, it was free to reject it in its entirety. (Tr. 43, 1943.)

Heavily relying on *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984), defendant argues that the Federal Rules of Evidence prohibit testimony about domestic law. The Federal Rules of Evidence permit expert testimony which "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. An expert may testify as to his opinion concerning an "ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704. The evidence in this case consisted, in large measure, of the language of the statute and two

possible interpretations. One crucial fact in issue was defendant's good faith in following advice of counsel based upon one of those two interpretations. The correctness of either interpretation is relevant only as it bears upon defendant's subjective view of the requirements of EIGA. The jury was properly instructed that the question of whether the legal advice given to defendant was correct was not determinative of his defense. (Tr. 1956-1957.) Permitting the jury to hear testimony material to that factual determination in this context did not delegate to them the judicial function of determining controlling legal principles. *See United States v. Clardy*, 612 F.2d 1139, 1153 (9th Cir. 1980); *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc).

In *Zipkin* the Court held that it was reversible error for the district court to permit a bankruptcy judge to testify about a question of bankruptcy law. *United States v. Zipkin*, 729 F.2d at 387. Defendant in that case, however, never claimed to have relied upon a legal interpretation of the particular provision in issue. Here, the defense theory was that defendant relied upon the legal interpretation of his attorneys. *Zipkin* does not preclude expert legal testimony *in rebuttal* where the central issue is defendant's subjective view of the requirements of the law. *See United States v. Clardy*, 612 F.2d at 1153; *United States v. Herzog*, 632 F.2d 469, 473 (5th Cir. 1980); *United States v. Garber*, 607 F.2d at 99.

In addition, defendant argues that cross-examination of Scott was impermissibly restricted. The Court refused to permit defendant's counsel to ask the witness whether he could identify the holdings of various Supreme Court cases by name and citation. The United States Reports is comprised of many more cases than any expert could be expected to be able to recite. *Reilly v. Pinkus*, 338 U.S. 269 (1949), which involved cross-examination of a medical expert's testimony concerning a medical dictionary, does not dictate a contrary result here. The expert agreed, time and time again, with the

proposition that defense counsel was trying to establish—that lawyers may differ on matters of statutory construction. The Court encouraged defense counsel to pursue that line of questioning generally, without turning the cross-examination into a guessing game for the jury's benefit.

Introduction into Evidence of Financial Statements and Checks

The government introduced into evidence financial statements and checks through the testimony of Connie Hansen, the defendant's wife. Defendant maintains that these items were not properly authenticated and irrelevant to the issues at trial, and, therefore, should not have been admitted.

Under Fed. R. Evid. 901, the authenticity of an item is established by evidence which would lead a reasonable mind fairly to conclude that the item is what it purports to be. *United States v. Blackwell*, 694 F.2d 1325, 1330 (D.C. Cir. 1982); *United States v. Sutton*, 426 F.2d 1202, 1207 (D.C. Cir. 1969). This evidentiary showing may be made by circumstantial evidence. Fed. R. Evid. 901(b)(4); *United States v. Sutton*, 426 F.2d at 1207; *United States v. Clark*, 649 F.2d 534, 542 (7th Cir. 1981). Once the Court finds, in its discretion, that the required showing of authenticity has been made, any remaining uncertainty goes to the evidentiary weight of the item, not its admissibility. *United States v. Brewer*, 630 F.2d 795, 802 (10th Cir. 1980); *United States v. American Radiator & Stand. San. Corp.*, 433 F.2d 174, 192 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). Both categories of items were properly authenticated.

Mrs. Hansen testified that the financial statements had been prepared by her husband, (Tr. 1249-1250), and represented the Hansens' assets. (Tr. 1253.) The property separation agreement, which described in detail the

Hansens' assets and liabilities, is circumstantial evidence of the authenticity of the financial statements. Despite some testimony that Mrs. Hansen may not have seen the financial statements previously, from all of the evidence, a reasonable juror could conclude that they were prepared by defendant. The financial statements were introduced to show that the Hansens reported joint ownership of their property before and after the property separation agreement, and that no physical separation of the Hansens' property ever occurred. The government never argued nor implied that the financial statements contained false representations. It fairly contrasted the representations in the statements with defendant's and Mrs. Hansen's repeated assertions, that Mr. Hansen was a man of modest means in need of large sums of money to retire his political debt. Thus, the financial statements were clearly relevant to the issues at trial, Fed. R. Evid. 402, and clearly more relevant than prejudicial. Fed. R. Evid. 403.

Mrs. Hansen was also asked about a series of personal checks and cashier's checks. At the time the checks were offered into evidence, it had already been established that Mrs. Hansen's $87,475 profit from the silver commodities transaction of January 16-18, 1979 had been deposited in a joint account for George and Connie Hansen at First Security Bank of Pocatello, Idaho, on January 22, 1979. (Tr. 325-327, 371, 467-470.) Mrs. Hansen testified that the four checks in Government Exhibits 73A-D, dated January 22, 23, 24 and 25, 1979, were written to a joint account at First Security Bank, signed by the defendant, made payable to First Security Bank and contained a notation that they were to be used to buy cashier's checks. (Tr. 1298-1299.) Mrs. Hansen then identified the cashier's checks from First Security Bank on the same date and in the same amounts as those written on the joint account and testified that they were deposited in the Idaho State Bank, (Tr. 1299, 1302, 1304), and that they contained the

defendant's signature. (Tr. 1310.) Finally, Mrs. Hansen identified nine personal checks, Government Exhibits 75A-J, written by defendant on a joint account at the Idaho State Bank on dates from January 23, 1979 to January 29, 1979. (Tr. 1305-1306, 1309.) Mrs. Hansen's testimony easily established the authenticity of these documents.[3]

Defendant questions the competency of this witness to testify concerning these documents of which she claimed to have no personal knowledge and which defendant deemed irrelevant and highly prejudicial to his case. However, the checks were used to impeach Mrs. Hansen's testimony about matters of which she did have personal knowledge. She testified that she authorized the defendant to use the entire $87,475 silver profit, and that he used the money to pay political debts. (Tr. 1211, 1292, 1297, 1303-1304.) Stipulation No. 8 stated that the defendant had used that money, knowing it to be the silver profit. (Tr. 502.) Her testimony appeared to contradict the Stipulation. Moreover, her apparent lack of specific knowledge about the checks indicated that she did not know how the silver profit had been spent, and that the transaction had not been hers alone. Therefore, the checks tested the truth of Mrs. Hansen's assertions and were relevant to a central issue at trial: whether the Hansens had an economic separation which would enable the Congressman not to report his wife's income.

Defendant maintains that the government impugned his integrity before the jury by suggesting that he attempted to conceal this money. Yet, substantial evidence in the record supported the reasonable inference

3. Defendant erroneously compares the checks admitted at this stage with one later excluded. The authenticity of the checks in the government's exhibits was established largely by the fact that Connie Hansen shared the joint account upon which the checks were written and deposited into. The Defendant's Exhibit 89, which was excluded for lack of authenticity was not supported by this type of convincing evidence.

that there was something unusual about the way the silver profit was handled, which was relevant to the issue of criminal intent. Balancing the possible prejudice from the introduction of the checks against its significant probative value, the checks were properly admissible.

Closing Argument

The highly effective closing arguments of both parties were each marked by rather strong language. Defendant claims that the government's argument contained several improprieties which inflamed the jury to convict him. Specifically, defendant challenges:

1. The expression "stench of political corruption";

2. The reference to "the lie";

3. The "patently clear" testimony of absent "Departmental officials";

4. The reference to defendant's status as a "lawmaker"; and

5. The invitation to "send a message" to Congress about the defendant's ethics.

While the government may have been somewhat vigilant in its remarks, it did not "strike any foul blows". *Berger v. United States*, 295 U.S. 78, 88 (1935) (the prosecutor "may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.") When viewed in the context of the atmosphere at trial, and in relation to all of the evidence in this case, the government's argument did not exceed the bounds of fairness.

In summation, the government described credible evidence in this case which suggested that the defendant had a motive for not reporting certain transactions

on his EIGA forms. If the defendant had engaged in politically corrupt practices he would be reluctant to make them public information. Because the government's comment about the "stench of political corruption" had some support in the record, it was not improper for injecting an unrelated broader issue into the trial. *See United States v. Caldwell*, 543 F.2d 1333, 1362 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976). Even were that comment too heavy-handed, any possible prejudice therefrom was soon cancelled by defense counsel's equally forceful language, when he claimed to smell the "stench of personal ambition" on the part of the prosecutor. Indeed, the trial was replete with colorful phrases and innuendos, none of which warrants setting aside the jury's verdict, particularly in light of the evidence adduced and the revealing demeanor and tone of some of the defense witnesses.

In his closing argument, defense counsel emphasized Defendant's Exhibit 88 which was an FBI report of an interview with the defendant. At the interview, defendant stated that he had discussed the silver commodities transaction at length with his attorneys and that the profit went to pay off his wife's debts. However, Mr. Runft testified that he knew very little about it, (Tr. 1092), and Mr. McKenna testified that he never spoke to the defendant about it. (Tr. 1500-1501.) Other evidence established that the profit was not used to pay debts. In rebuttal, the government highlighed these discrepancies and referred to defendant's statements at the interview as lies. (Tr. 1910-1911.) Defendant's pretrial statements were in evidence and subject to examination in light of seemingly contradictory evidence. *See United States v. Isaacs*, 493 F.2d 1124, 1166 (7th Cir.), *cert. denied sub nom., Kerner v. United States*, 417 U.S. 976 (1974). Moreover, defense counsel had himself made reference to lying and argued that the defendant "didn't lie" on his EIGA forms. (Tr. 1847, 1905.) These remarks invited rejoinder by the government.

In response to defense counsel's remark about personal ambition, the government said that the case was assigned to the Public Integrity Section of the Department of Justice because it was "patently clear to the departmental officials on April 6, 1981, what we. . . ." (Tr. 1914.) The argument was interrupted at that point by defense objection, and the sentence was never finished. Defendant claims that the government's statement left the jury to speculate why it was so "patently clear" that the case was assigned to the Public Integrity Section and that it unfairly enhanced the credibility of the government's case by placing the opinion of Departmental officials behind it. *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981). Yet, the defense witness, Kenneth A. Caruso, explained that this case was referred "ultimately to the public integrity section of the criminal division in the Justice Department," and that "the public integrity section handles only one kind of case, and that is cases involving allegations of wrongdoing by public officials." (Tr. 1001-1002.) In addition, the nature of the bribery allegations within the blackmail letter and the defendant's actions at the Department of Justice were matters in evidence at trial. Thus, assuming the incomplete sentence was sufficiently complete to permit the jury to draw an inference about why the case was assigned the way it was, that inference had clear support in the record.

Next, defendant alleges that it was improper for the government to comment about his status as a Congressman. He rightly maintains that he should not be held to a higher standard because of that status. With the Court's endorsement, the government cautioned the jury not to hold that fact against him, nor favor him because of it. (Tr. 96-98, 1808.) When defense counsel explained in his closing argument that Congressman Hansen was not likely to lie on his EIGA forms, he stated "He's a congressman. He wasn't born yesterday. He's not

naive, he's not a babe in the woods." (Tr. 1890.) In rebuttal, the government simply made reference to the fact that, as a Congressman, defendant was in a different position when he requested legal advice on the meaning of a law passed by Congress. The reference was made within a discussion of Hansen's good faith in seeking legal advice. That reference does not warrant setting aside the verdict, given the government's initial caveat, and the similar reference by defense counsel.

Defendant argues, finally, that the appeal to the jury to send a message to Congress about the Congressman's ethics was highly prejudicial and amounts to reversible error. The Court declined to instruct the jury to disregard that portion of the government's argument (or the "personal ambition" remark) in order not to unduly emphasize those particular phrases, but asked the government not to continue in that fashion. (Tr. 1926-1927.) Moreover, it was noted that defense counsel had recommended that the jury return a quick verdict of not guilty to show what they thought about this case and "about what the prosecutors have done." (Tr. 1906-1907.) It was also noted that this "message" was not *per se* improper. (Tr. 1928.) The jury heeded defense counsel and did return a prompt verdict.

Nor was it improper for the government to describe the evidence of motive in this case in the context of the purpose of EIGA: to promote public confidence in the integrity of government officials through the requirement of financial disclosure and the prevention of conflicts of interest. (Tr 33-78.) The government did not refer to "wholly irrelevant" facts or issues. *Viereck v. United States*, 318 U.S. 236, 247 (1943). The government invited the jury to acquit the defendant if, after it weighed the evidence, in light of EIGA and its purposes, it determined that he had no motive for not reporting the items omitted from his EIGA forms. (Tr. 1925.) There was never any question that the items had been omitted;

the government merely highlighted for the jury, defendant's seemingly weak explanations as to why they had been omitted. While, in general,"sending messages" is not part of the jury's legitimate function, *Viereck v. United States*, 318 U.S. at 247-48, in this case, the jury was left to resolve only the issue of whether Congressman Hansen acted with criminal intent when he filled out his EIGA forms. Finding that the government acted in good faith, after provocation, and that there was sufficient evidentiary support for its remarks, reversal of the jury's verdict is not warranted on the basis of the government's closing argument. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 646-647 (1974).

The jury's verdict was based upon persuasive and substantial evidence, throughout a 10-day trial. The jury had full opportunity to evaluate the credibility of witnesses, government and defense alike. It could accept or reject that testimony on the basis of its reasonableness or unreasonableness, probability or improbability, in determining whether the testimony had been contradicted or corroborated by other credible evidence. The government used leigitimate means to bring about a just and effective conviction in this case. Defendant received a fair trial in all respects and, accordingly, his motions are denied.

SO ORDERED.

This the 8th day of June; 1984.

JOYCE HENS GREEN
United States District Judge

Supreme Court, U.S.
FILED
FEB 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-973

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE VERNON HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner violated 18 U.S.C. 1001 by filing false financial disclosure statements under the Ethics in Government Act, 2 U.S.C. 701 *et seq.*

2. Whether the question of the materiality of petitioner's false statements should have been submitted to the jury.

3. Whether the district court abused its discretion in admitting expert testimony to rebut petitioner's advice-of-counsel defense.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-973

GEORGE VERNON HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 772 F.2d 940. The memorandum opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 23a-47a) is reported at 566 F. Supp. 162. The district court's orders on various motions (Pet. App. 48a-51a, 52a-67a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1985, and a petition for rehearing was denied on November 1, 1985 (Pet. App. 21a). The petition for a writ of certiorari was filed on December 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on four counts of making false statements, in violation of 18 U.S.C. 1001, and sentenced to five to 15 months' imprisonment and a fine of $40,000. The court of appeals affirmed. Pet. App. 1a-20a.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner, a former Member of Congress, failed to report certain transactions on the financial disclosure statements that he was required to file pursuant to the Ethics in Government Act (EIGA), 2 U.S.C. 701 *et seq.*, for the years 1978 through 1981. The Act requires each Member to disclose in an annual report filed with the Clerk of the House of Representatives information concerning income, debts, gifts received, and financial holdings and transactions. 2 U.S.C. 702(a). Each congressman must also report the financial holdings, debts, and transactions of his or her spouse except with respect to items wholly independent of the Member's own financial affairs. 2 U.S.C. 702(d)(1)(D).

Three of the four charged offenses related to petitioner's dealings with financier Nelson Bunker Hunt. Sometime before April 1977, petitioner sought Hunt's assistance in paying debts of at least $300,000. Tr. 81-82. Hunt agreed to help petitioner by arranging for petitioner's wife, Connie Hansen, to profit through various investments. Tr. 85. In one instance, Hunt instructed a broker to trade in soybean futures for Mrs. Hansen. When the trading resulted in a loss, Hunt arranged for Mrs. Hansen to obtain a $50,000 loan from a Dallas bank. Tr. 97-102, 208, 258-259. Hunt later purchased the loan from the bank for $61,000, making Mrs. Hansen liable to him for that amount. Tr. 103-104, 275. In another transaction, Hunt arranged for petitioner's wife to obtain an $87,000 profit through trading in silver

commodity futures. Tr. 114-115, 321-329, 371-372. Petitioner fully participated in each of these transactions: the proceeds were deposited into joint accounts maintained by him and his wife and were used by petitioner for personal expenses. Tr. 292-301, 447-452, 469-470. The fourth offense involved $135,000 in loans received by petitioner from individuals whom he was assisting in efforts to promote a hydrogen-powered automobile to the United States Army. *E.g.*, Tr. 512-530, 559-571, 696-697, 710-716.

Petitioner failed to report any of these loans or the commodity profit on his financial disclosure statements. He claimed at trial that he had relied on his attorneys' advice that the Hunt transactions were not reportable in view of a property agreement between petitioner and his wife and that the other funds were borrowed on behalf of a nonprofit taxpayer organization. The district court admitted testimony of a government attorney concerning the requirements of EIGA to rebut petitioner's advice-of-counsel defense. See Pet. App. 58a-60a.

2. The court of appeals affirmed. Pet. App. 1a-20a. The court held that 18 U.S.C. 1001, which broadly proscribes the making of false statements to the government, applied to petitioner's false statements on his EIGA reports in the absence of any clear congressional intent to exempt such reports from the false statements statute. Pet. App. 3a-15a. The court also determined that petitioner's omissions on his forms were material and that this question was properly resolved by the district court and did not have to be submitted to the jury. *Id.* at 15a-18a. The court of appeals agreed with the district court's rejection of various other contentions raised by petitioner. *Id.* at 20a.

ARGUMENT

1. Petitioner contends primarily (Pet. 13-19) that his deliberate filing of false financial disclosure statements under the EIGA may not be prosecuted under the federal

false statements statute, 18 U.S.C. 1001. In the first appellate opinion addressing the issue, the court of appeals rejected petitioner's contention in a well-reasoned analysis (Pet. App. 3a-15a), on which we rely. Briefly, the court of appeals concluded that Section 1001 is by its terms "plainly applicabl[e]" to petitioner's conduct (*id.* at 4a), that nothing in the language or legislative history of the EIGA indicates that Congress clearly intended to make Section 1001 inapplicable to violations of the Act (*id.* at 6a-10a, 11a-14a), and that requiring EIGA to state expressly that Section 1001 applies to violations of its provisions would "deprive[] 1001 of its plainly intended self-operative effect" (*id.* at 10a). See also *id.* at 29a-35a (district court's discussion of EIGA's legislative history, reaching the "inescapable conclusion * * * that Congress simply did not intend to render section 1001 inapplicable to the intentional falsification of EIGA financial disclosure reports").

The decision of the court of appeals is fully in accord with this Court's precedents recognizing the breadth of Section 1001 (*e.g., United States* v. *Yermian*, No. 83-346 (June 27, 1984)) and the heavy burden that must be shouldered in order to demonstrate that Congress impliedly repealed one statutory provision by enacting another (*e.g., TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978)).[1] Should Congress wish to

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[1]Petitioner's attempt (Pet. 16) to recast his claim in terms that would avoid the doctrine disfavoring implied repeals is palpably flawed. Section 1001 by its terms indisputably applies to false reports filed under the EIGA. The question therefore is not whether Congress manifested a clear intent in the EIGA to make such filings criminal—that had already been accomplished—but rather whether Congress clearly intended to exempt EIGA violations from what would otherwise be the reach of Section 1001. See Pet. App. 4a-5a. Petitioner's reliance (Pet. 16) on the rule of lenity is particularly misplaced: not only does Section 1001 by its terms unambiguously apply to petitioner's misconduct, but the forms filed by petitioner expressly advised that false statements would be subject to criminal penalties under that statute. See Pet. App. 15a.

exempt its members from criminal penalties in this area, it is of course free to consider amending the EIGA. This Court should not undertake to accomplish the same result merely on the basis of the snippets of legislative history on which petitioner relies.

Dowling v. *United States*, No. 84-589 (June 28, 1985), relied on by petitioner (Pet. 16-18), is altogether inapposite. There, the Court held that the National Stolen Property Act, 18 U.S.C. 2314, does not apply to the interstate transportation of certain "bootleg" phonograph records. Contrary to petitioner's assertion (Pet. 17) that Section 2314's literal language reached this conduct, the Court concluded (*Dowling*, slip op. 9) that "the common-sense meaning of the statutory language" did not proscribe the transportation in question. It was in the context of such "ill-fitting language" (*id.* at 11) and the absence of congressional intent to proscribe conduct such as the defendant's in that case (*id.* at 11-14) that the Court went on to observe as well that Congress has "chiefly relied on an array of civil remedies" rather than criminal sanctions in the area of copyright infringement (*id.* at 14). In contrast, the language and legislative history of Section 1001 make clear beyond doubt that it applies to petitioner's false filings. See generally *United States* v. *Rodgers*, 466 U.S. 475 (1984). The Court in *Dowling* simply had no occasion to address the question whether a civil remedy may impliedly repeal an otherwise plainly applicable criminal sanction. And as the court of appeals demonstrated, there is no basis for finding such an implied repeal in this case.

2. Petitioner argues next (Pet. 19-21) that the question of the materiality of his false financial disclosure statements should have been submitted to the jury. This Court has repeatedly denied certiorari in cases presenting the same contention and relying upon the same alleged conflict among the circuits. See, *e.g.*, *United States* v. *Greber*, 760

F.2d 68 (3d Cir. 1985), cert. denied, No. 85-35 (Nov. 12, 1985); *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362 (4th Cir. 1985), cert. denied, No. 84-1771 (Oct. 7, 1985); *United States* v. *Elkin*, 731 F.2d 1005 (2d Cir. 1984), cert. denied, No. 83-1848 (Oct. 1, 1984); *United States* v. *Abadi*, 706 F.2d 178 (6th Cir.), cert. denied, 464 U.S. 821 (1983). There is no reason for a different result here.

Petitioner recognizes (Pet. 21) that the court of appeals' holding that materiality is an issue of law is consistent with the law in the majority of circuits. See, *e.g.*, *United States* v. *Greber*, 760 F.2d at 73; *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d at 367; *United States* v. *Elkin*, 731 F.2d at 1009; *United States* v. *Abadi*, 706 F.2d at 180; *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *Fern*, 696 F.2d 1269, 1274 (11th Cir. 1983); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Clancy*, 276 F.2d 617, 635 (7th Cir. 1960). The holding also accords with this Court's recognition that the materiality of false statements generally is a question for the court (*Sinclair* v. *United States*, 279 U.S. 263, 298 (1929)), and with the generally accepted pattern jury instructions (see 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977)). Petitioner contends, however, that the Ninth and Tenth Circuits have approved the practice of submitting the question of materiality to the jury (see *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979)) and that this conflict warrants resolution by this Court.[2]

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[2]Petitioner's reliance (Pet. 20-21) on *United States* v. *Johnson*, 718 F.2d 1317 (5th Cir. 1983) (en banc), is misplaced. The court there expressly adhered to the rule followed by the court of appeals in this

Petitioner has cited no case, however, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not submitted to the jury. The Tenth Circuit has approved the practice of submitting it to the jury (*Irwin*, 654 F.2d at 677 n.8); the Ninth Circuit has characterized the failure to do so as error, while nevertheless affirming the convictions in question because materiality had been so clearly established (*Valdez*, 594 F.2d at 729). In this case, petitioner does not now argue that his failure to report financial transactions involving sums ranging from $50,000 up to $135,000 was not material, and their materiality indeed cannot be doubted, for the reasons stated by the court of appeals. Pet. App. 15a-18a. Since petitioner's "falsification[s] pertain[] specifically to the area the [congressional committee] is charged to investigate (a filing Member's financial transactions), and tend[] to conceal in any degree * * * material that would prompt or affect an investigation" (*id.* at 18a), it is clear that the false filings "had a 'natural tendency to influence, or [were] capable of affecting or influencing, a governmental function' " (*United States* v. *Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982), quoting *United States* v. *Markham*, 537 F.2d 187, 196 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977)). Where the materiality of petitioner's false filings is so clearly established, there is no reason to believe that any other court of appeals would have granted petitioner the relief he seeks. Thus, to whatever extent a conflict may exist,[3] the present case does

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case that "the materiality of false statements is a question for the court." *Id.* at 1324 (footnote omitted). The court merely refused to extend this settled principle to the question whether a document was a "security" within the meaning of 18 U.S.C. 2314.

[3]The Ninth and Tenth Circuits have held that materiality is an issue of law to be decided by the court in prosecutions for false statements under 26 U.S.C. 7206(1) (*United States* v. *Flake*, 746 F.2d 535, 537 (1984), cert. denied, No. 84-6013 (Feb. 19, 1985); *United States* v. *Strand*, 617

not provide an appropriate occasion for this Court to address it.

3. Finally, petitioner contends (Pet. 21-23) that the district court abused its discretion in admitting testimony by an expert witness to rebut petitioner's advice-of-counsel defense. The court of appeals did not consider this fact-bound issue worthy of separate discussion (Pet. App. 20a); the district court demonstrated why the evidence was admissible in its order denying petitioner's motion for a new trial (*id.* at 58a-60a). It was petitioner who injected the issue of the reasonableness of his attorneys' interpretation of the EIGA into the case, and the government's rebuttal testimony did not usurp the judge's function to instruct the jury on the governing law. Rather, as the district court noted, the evidence served simply "to impeach the credibility of [petitioner's] witnesses and to raise the question of whether or not [petitioner] acted in good faith in relying on his attorneys' advice." *Id.* at 58a. The district court's admission of this evidence was well within its discretion. See, *e.g.*, *United States* v. *Clardy*, 612 F.2d 1139, 1153 (9th Cir. 1980) (expert testimony on the law "is relevant to the issue of willfulness where the theory of the defense is that there is a good faith dispute as to the interpretation of the * * * law[]").

United States v. *Zipkin*, 729 F.2d 384 (6th Cir. 1984), on which petitioner relies (Pet. 22), is not to the contrary, as the district court explained (Pet. App. 59a). The defendant in that embezzlement prosecution was a bankruptcy receiver. The bankruptcy judge under whose order the defendant was acting was permitted to testify at trial on behalf of the

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F.2d 571, 574, cert. denied, 449 U.S. 841 (1980)) and in prosecutions for perjury (*United States* v. *Prantil*, 756 F.2d 759, 769 (1985); *United States* v. *Masters*, 484 F.2d 1251, 1254 (1973)), contexts not readily distinguishable from prosecutions under Section 1001.

government with respect to the proper interpretation of bankruptcy law and the order that he had issued. Understandably, the court of appeals concluded that this testimony was highly prejudicial. 729 F.2d at 387. Moreover, unlike here, the defendant in *Zipkin* did not defend on the basis of the reasonableness of another interpretation of the law. As the district court correctly reasoned (Pet. App. 59a (emphasis in original)), "*Zipkin* does not preclude expert legal testimony *in rebuttal* where the central issue is defendant's subjective view of the requirements of the law." None of the other cases relied on by petitioner (Pet. 22-23) holds the admission of expert testimony reversible error in circumstances similar to those presented here.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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FEBRUARY 1986

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[4]In any event, the introduction of the evidence in question did not prejudice petitioner in view of the district court's instruction that the jury should give the testimony "whatever weight it felt it deserved, accounting for any bias [the witness] might have toward the government, and that, indeed, [the jury] was free to reject it in its entirety." Pet. App. 58a; see *United States* v. *Clardy*, 612 F.2d at 1153. We note as well that petitioner does not now directly dispute the correctness of the government witness's testimony.

Supreme Court, U.S.
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No. 85-973

IN THE

Supreme Court of the United States

October Term, 1985

GEORGE VERNON HANSEN
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

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GEORGE VERNON HANSEN,
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PETITIONER'S REPLY BRIEF

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1. The only question before the Court at this juncture is whether the legal issues raised by this case are *important* enough to deserve plenary consideration. The decision of the court of appeals clears the way for possible criminal investigations by the Justice Department of the private finances of United States Senators and Representatives, and of all federal judges about whom any suspicion is raised. According to newspaper reports,

the criminal indictment of the 1984 Democratic Vice-Presidential nominee is contingent upon whether the decision below is correct, as are criminal proceedings against a number of other present and former Congressmen.[1] Whether Congress has, in fact, authorized such criminal investigations and prosecutions — in light of a murky legislative record[2] — warrants authoritative decision by this Court. It would surely be unfair to deny review of this petition only to have the issue recur, at some later date, in the case of a more nationally known Member of Congress.

The Solicitor General's Brief in Opposition fails totally to address the importance of the legal issue. The Solicitor General does not contest our statement that the Court of Appeals for the District of Columbia is the *only* federal court of appeals that is ever likely to consider the applicability of 18 U.S.C. §1001 to Members of Congress who submit incomplete or false EIGA reports (Pet. 13-14). Thus a very troublesome legal issue that has great practical significance and authorizes substantial inroads into the independence of the Legislative and Judicial Branches has been effectively decided by three intermediate federal appellate judges.

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1. While this case was pending in the court below, the prosecutor told a reporter that if petitioner's legal position is sustained, it will "close the door on a lot of [financial disclosure] cases being pursued for possible prosecution." *The Washington Times*, May 3, 1985, p. 3A ("Justice Set To Move in Ferraro Financial Allegations").

2. The prosecutor acknowledged in the court below that when EIGA was adopted there was "no consensus" and "no expression of the intent of Congress as a whole" on whether false statements could be criminally punished. The most he could claim in support of his legal position was that "some members" of the House believed there would be no criminal penalties while "other members" anticipated that Title 18 would apply (Gov't Brief in the Court of Appeals, pp. 31, 33, 42).

Many Members of Congress have expressed their strong disagreement with the decision of the court of appeals. In the lower court, 123 Members of Congress — Democrats as well as Republicans — filed an *amicus curiae* brief arguing vigorously that Congress had not imposed *any* criminal penalty when it enacted EIGA in 1978. The court below barely gave a nod to that firm statement of opinion from the Congress.

2. We believe, of course, that the court of appeals erred when it applied 18 U.S.C. §1001 — the False Statements Act adopted in 1909 and amended to its present form in 1948 — to a law enacted in 1978 that created a wholly new statutory duty for Members of Congress and the federal judiciary. None of the various bills that led up to the enactment of EIGA in 1978 remotely contemplated any criminal sanction more serious than a misdemeanor penalty for willful nondisclosures or falsifications on EIGA forms. Even the proposed misdemeanors were dropped during congressional deliberations because, as one Congressman perceptively noted, the bill would never have passed the House if Members of Congress believed that violations could result in criminal penalties. 124 *Cong. Rec.* 30457 (1978). As a result, only a civil procedure and civil penalty were prescribed by the law for anyone "who knowingly and willfully falsifies or who knowingly or willfully fails to report any information . . ." 2 U.S.C. §706.[3] No use of the civil rem-

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3. The effort made by the court below to reconcile this sweeping civil remedy with the application of 18 U.S.C. §1001 is unsuccessful. The court said that there is "a natural progression in penalties: those who intentionally fail to file EIGA forms are subject only to the civil sanction of §706, while those who lie on their forms are additionally subject to the criminal penalty of §1001" (Pet. App. 7a-8a). But why would Congress have provided a civil $5,000 fine for anyone who "knowingly and willfully falsifies" if a person who

edy has ever been made. Instead, the Department of Justice has deliberately bypassed the civil route that Congress explicitly prescribed. The first violation of EIGA it has ever brought to a court has been a criminal case, invoking a criminal law that Congress never contemplated.[4]

The court below agreed that the legislative history of EIGA warrants the surmise that "some Members of Congress, and perhaps even a number providing the crucial margin for passage of the bill, would have objected" if 18 U.S.C. § 1001 had explicitly been made applicable. Pet. App. 10a-11a. Hence, the court below is prepared to see a Member of Congress imprisoned on felony charges even though it acknowledges that there would not have been a majority of the House endorsing a criminal sanction if it had been explicitly stated.

Contrary to the view expressed by the Solicitor General, this result conflicts with the general rule of lenity applied by this Court in criminal cases (*United States v. Bass*, 404 U.S. 336, 348 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971)). It also conflicts with the analysis provided by the Court in *Dowling v. United States*, 105 S. Ct. 3127 (1985). The court below failed to consider *Dowling* even though that decision was brought to its attention in a petition for rehearing. In all events, the

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NOTES *(Continued)*

"knowingly and willfully falsifies" may be criminally prosecuted under 18 U.S.C. §1001 and fined up to $10,000 — in addition to receiving a jail term? The "progression" to which the court below refers would have been effective if 2 U.S. C. §706 had not included the words "who knowingly and willfully falsifies."

4. We noted in our Petition that the same Congress that enacted EIGA knew exactly how to make 18 U.S.C. §1001 applicable. Laws enacted just days *before* EIGA and just days *after* it was adopted, explicitly made 18 U.S.C. §1001 applicable to other new statutory obligations. The Solicitor General totally ignores this obvious indicator of congressional intent in his Brief in Opposition.

legal issue presented is important enough and has a sufficiently significant impact on the Separation of Powers, that it deserves plenary review.

3. The Solicitor General acknowledges that there is a conflict among the Circuits over whether the element of materiality in a false-statement prosecution must be submitted to the jury. He argues that "[t]his Court has repeatedly denied certiorari in cases presenting the same contention and . . . [t]here is no reason for a different result here" (Br. in Opp. 5-6) (citations omitted).[5] But the Solicitor General overlooks the fact that all of the cases he cites concerned prosecutions for affirmative false statements. *See United States v. Greber*, 760 F.2d 68, 70 (3d Cir. 1985); *Nilson Van & Storage Co. v. Marsh*, No. 84-1771, Br. in Opp. at 2; *United States v. Elkin*, 731 F.2d 1005, 1007 (2d Cir. 1984); *United States v. Abadi*, 706 F.2d 178, 179 (6th Cir. 1983). By contrast, this case involves information that has been omitted, so that this Court's observations in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976), are directly applicable. *See* Pet. 20-21. *Accord, United States v. Johnson*, 718 F.2d 1317, 1324 n. 20 (5th Cir. 1983) (*en banc*) (distinguishing between false-representation and failure-to-disclose cases). In a failure-to-disclose situation, the judgment of a jury is particularly important in determining guilt or innocence because the issue of materiality is more factual than legal.

The Solicitor General also asserts that in this case the materiality of the omissions "cannot be doubted" (Br. in Opp. 7). In fact, we argued in the district court and in the court of appeals that precisely the opposite was true. Given the very limited oversight provided by the governing congressional committee, the omissions were, in our

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5. Justice White has indicated his belief, however, that certiorari should be granted to resolve this conflict. *See Greber v. United States*, No. 85-35, 54 U.S.L.W. 3328 (Nov. 12, 1985) (White, J. dissenting).

view, *immaterial as a matter of law*. One need not accept that agrument, however, to recognize that the issue should have been presented to the jury. This Court has noted that an accused's constitutional right to a jury trial must remain free of judicial interference "regardless of how overwhelmingly the evidence may point in [the Government's] direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977).

4. The Solicitor General virtually ignores the contention that it was improper for the prosecution to put a "legal expert" on the stand, treating it as a "fact-bound issue" committed to the district court's "discretion" (Br. in Opp. 8). The Solicitor General misunderstands what happened at the trial when he says that the petitioner "injected the issue of the reasonableness of his attorneys' interpretation of the EIGA into the case" (*id.*). "Reasonableness" was not the issue. The relevant question was whether petitioner had been given legal advice and had relied on it. (Petitioners' attorneys testified unequivocally that they had told him to omit the questioned items from his EIGA forms.) Whether a government "legal expert" agrees with the legal advice petitioner was given is irrelevant, and it carries prejudicial impact with the jury. The Sixth Circuit so held in the *Zipkin* case, and the Second, Eighth and Ninth Circuits have agreed. *See* Pet. 22-23. These appellate decisions rest on a proper understanding of the undue weight that a prosecution's "legal expert" can have with a jury. This Court should reverse the decision below so that prosecutors will not henceforth offer the testimony of "legal experts" to prejudice juries against criminal defendants.

For the foregoing reasons we believe that all the legal issues presented by our petition are sufficiently *important* to warrant full review by this Court. Once review is granted, the judgment below should be reversed.

Respectfully submitted,

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